OPERATIONS OF FEDERAL JUDICIAL MISCONDUCT STATUTES

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

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THURSDAY, NOVEMBER 29, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good morning, ladies and gentlemen. Welcome to the hearing this morning.

I am advised that there will imminently be a journal vote, in which case we will have to disembark and head for the floor. And I think there will be a new Member that will be sworn in, as well, so this may involve about 15 to 20 minutes. So if you all will rest easy while we are away—but Howard and I have decided to go ahead and give our opening statements, so that will at least save some time.

Today, we will review the operation of those mechanisms designed to compel ethical behavior among Federal judges. I emphasize to our witnesses that this hearing was not scheduled in response to individual misconduct cases brought to the attention of the Subcommittee. Rather, I firmly believe that the Subcommittee is charged by the Constitution and the House rules to conduct vigorous oversight on a regular basis.

On the whole, I believe that the Federal judiciary is functioning well, but no branch of government—and I think we will all agree—is immune from evaluation. The point of this hearing is to take the ethical temperature of the Third Branch and determine what, if anything, should be done to improve upon its current record. Such an exercise, I believe, will assist in improving the administration of the United States courts and also instill greater public confidence in their operations.

At this point, let me digress a moment, if I may, to caution our witnesses and our Subcommittee Members to try to stick to the subject matter at hand. More specifically, we have not convened this morning to debate competing judicial philosophies or schools of thought, nor are we meeting to critique the merits of individual district or circuit decisions that touch upon hot-button issues. Health care environment, organized labor or the workings of the American industry are topics that I think should not be emphasized today. I am not very interested in examining the reading hab-

its or seminar attendance practices of life-tenured judges who are desirous of becoming better educated or informed. These are all good hearing topics, but I think are not the focus of the hearing today.

We should primarily concern ourselves with determining whether the Judicial Conduct and Disability Act, along with the relevant recusal statutes, are working as intended.

To conclude, while each of us is possessed of unique life experiences and personal political convictions, I believe we are all united in our desire this morning to support a vibrant, strong and independent judiciary.

Finally, I personally wish to thank everyone on the panel for his patience in working around the evolving Subcommittee schedule in preparation for this hearing. Folks, as you all know, since September 11, things have had an irregular turn, scheduling and otherwise, and I appreciate your flexibility and also appreciate the Members of the Subcommittee for your flexibility.

I am now pleased to recognize my good friend, the distinguished gentleman from California, the Ranking Member, Mr. Berman, for his opening statement, after which we will adjourn to the floor and return soon.

Mr. Berman.

Mr. BERMAN. Thank you very much, Mr. Chairman. Given the accuracy of your prediction about a vote coming at this point, I was wondering if you can tell me when we are adjourning for the year.

I thank you for calling this hearing on Federal judicial misconduct statutes. This hearing provides us the opportunity to discuss and evaluate the utility of these statutes and to find ways in which we can improve either the statutes themselves or the methods and frequency with which they are employed.

I would like to thank all of our witnesses for appearing today. Among the four witnesses, we have expert knowledge of the Federal courts, judicial ethics and the laws and commissions that govern judicial discipline and removal. I look forward to their input on this issue. I particularly welcome Mike Remington, who for many years gave his expertise on this side of the podium and now is appearing before us as a witness for the first time.

I have no doubt that many of our Nation's fine judges could impartially and fairly decide a case involving a company in which they hold stock. Likewise, many are highly capable of deciding a case solely on the facts presented while subsuming strong personal opinions on the issues presented or ignoring ex parte communications. Nonetheless, we must ensure that the procedures for reporting and evaluating potential conflicts are working smoothly. It is also important for us to determine how thoroughly complaints are treated within the judiciary if a concern is raised by a litigant.

Our laws must, to the extent possible, guarantee complete judicial impartiality while still preserving the independence of the judicial branch through self-regulation. Today's hearings should inform us on the success of the judicial misconduct statutes in achieving this goal.

This hearing will be useful in raising awareness of these issues and will help us to determine if and where additional legislation

is necessary to prevent any Federal judicial misconduct or lessen the appearance of such misconduct.

Mr. Chairman, I take your point that this is not a hearing about judicial decisions. While I might be tempted to view a decision that I don't like as judicial misconduct, I think that is probably not the standard that our Founding Fathers envisioned and—and so, to that extent, I concur with your admonition.

I yield back, Mr. Chairman, and look forward to hearing the witnesses when we come back from our vote.

Mr. COBLE. Thank you, Mr. Berman. And as to my prediction for adjournment, I will take that under advisement and be back to you.

Folks, you all rest easy for about 10 minutes and we will return.

[Recess.]

Mr. COBLE. Thank you, folks, for your indulgence; and we will proceed.

I regret—as you know, we have two new Members that have been assigned to our Subcommittee since we last met, and I wanted to recognize each of them, but neither is present. And I regret that particularly, Professor Hellman, because the gentlelady from Pennsylvania wanted to introduce you, but I will recognize her when she gets here. I am sure she will be here later.

We are glad to have Arthur Hellman back with us, who has been here before. Professor Hellman teaches courses in Federal court civil procedure and constitutional law at the Pittsburgh School of Law. Earlier this year, Professor Hellman was designated as one of the school's first distinguished faculty scholars. He has participated in numerous institutional enterprises aimed at improving the administration of justice, both State and Federal. He served as the Chair of the Civil Justice Reform Committee of the American Judicature Society, and he supervised a distinguished group of legal scholars and political scientists in analyzing the innovations of the Ninth Circuit and its Court of Appeals. From 1999 through 2001, he served on the Ninth Circuit Court of Appeals Evaluation Committee.

Professor Hellman received his B.A. magna cum laude from Harvard University and his J.D. from the Yale School of Law. He has been a member of the faculty of the Pittsburgh School of Law since 1975.

Mr. Michael J. Remington, who was acknowledged by Mr. Berman—and I will reiterate what he said, Mike; it is good to have you back on the Hill.

Mr. Remington is a partner in the law firm of Drinker, Biddle & Reath, where he specializes in intellectual property law, court reform, government relations and lobbying. Prior to entering private practice, Mr. Remington held high-level positions in the three branches of the Federal Government. Most impressively, for a total of 13 years he was chief counsel of this very Subcommittee.

We have expanded our horizons jurisdiction-wise, Mike, since then, but it is good to have you back nonetheless.

In the judicial branch, Mr. Remington served as law clerk to U.S. District Judge John W. Reynolds and deputy legislative affairs officer to the Judicial Conference of the United States under Chief Justice Warren Burger.

In the executive branch, he was a prosecutor in the Criminal Division of the U.S. Department of Justice, where he specialized in criminal appeals. Finally, Mr. Remington is the former director of the National Commission of Judicial Discipline and Removal, an entity established by Congress to study and report to the President, Chief Justice and Congress on issues relating to judicial misconduct and impeachment.

A former Fulbright Scholar in Paris and Peace Corps volunteer in Africa, Mr. Remington is a graduate of the University of Wisconsin, where he received his law degree. He is admitted to practice in the State of Wisconsin and the District of Columbia as a member of the Intellectual Property Section of the American Bar Association.

Now I apologize to some of you all for the lengthy introductions. Mr. Berman and I know all about these people that many of you in the audience may not, and I think, for your information, this is in order.

Mr. Doug Kendall, who is the founder and executive director of a public interest law firm that helps State and local governments defend environmental and land use protections. Mr. Kendall represents his clients in State and Federal appellate courts around the country.

Mr. Kendall is the co-author of the "Takings Litigation Handbook," a comprehensive guide to defending land use protection. He has written numerous CRC reports, law journal articles and opinion pieces in major papers. Mr. Kendall received his B.A. in economics with high distinction from the University of Virginia in 1986 and his J.D. From the University of Virginia School of Law in 1992.

Now I am going to take a little bit of liberty from the Chair in recognizing our final witness. Each of us represents districts where a very select group of people stand out, not only in their respective professions, but generally in life, and such is applicable to Judge Osteen. Judge Osteen is presently serving as district court judge for the Middle District of North Carolina. Was appointed by President Bush in June 1991. He is a past member of the North Carolina State legislature, Chair of the Guilford County Economic Opportunity Council, member of the Greensboro, North Carolina, City Zoning Commission, and member and Chair of the Greensboro City Human Relations Commission.

From 1969 to 1974, he was U.S. Attorney for the Middle District of North Carolina. And in that capacity, I have to say—I am proud to say, he was my boss. He received his B.A. degree in economics from Guilford College and his LL.B. From the University of North Carolina School of Law 3 years later.

We are pleased, as well, to have Mrs. Osteen in the audience.

It is good to have all of you with us. We have written statements from all of the witnesses on the panel, which I ask unanimous consent to submit to the record in their entirety.

Before we begin, I am going to take some more liberty. I picked up today's edition of Roll Call and on the front page was embezzled or embodied or portrayed—strike that—embodied and portrayed a very handsome gentleman. And that was a very fine article, Mr. Delahunt. And I commend you for that.

Gentlemen, as you all know, you have been advised that we would like you to confine your testimony to the 5-minute rule. Now, when that red light appears in your eyes you will know that 5 minutes have elapsed. You will not be keyholed or taken into custody if you violate that. But when you see that red light, that is your invitation to pretty well wrap it down. We have your written testimony, which has been reviewed, which will be reviewed again.

Ms. Hart is not here yet, so we will suspend that.

Mr. Kendall, if you will begin your testimony. Good to have all of you with us, gentlemen.

STATEMENT OF DOUGLAS T. KENDALL, EXECUTIVE DIRECTOR, COMMUNITY RIGHTS COUNSEL

Mr. KENDALL. Mr. Chairman and Members of the Subcommittee, thank you for conducting this important oversight hearing on the operation of Federal judicial misconduct and recusal statutes.

Community Rights Counsel's work on private judicial seminars, better known as "junkets for judges," has focused on the operation of a Bozeman, Montana-based group called the Foundation for Research on Economics and the Environment, or FREE. FREE flies about 50 Federal judges a year to resorts and dude ranches in Montana to spend 5 or 6 days at a seminar on environmental law. FREE pays for judges' tuition, room and board, and travel expenses, a gift worth well over a $1,000.

FREE seminars, in their words, reject top-down command and control environmentalism and promote private property rights, market incentives and voluntary arrangements. FREE receives about one-third of its funding from a handful of large corporations, including Texaco, General Electric and Monsanto; companies that regularly litigate environmental cases in Federal court.

FREE's remaining funding comes mainly from foundations, such as the Sarah Scaife Foundation, which simultaneously funds groups like the Pacific Legal Foundation to litigate environmental cases in Federal court. Free's corporate funders regularly send corporate officers to FREE seminars where they get to lecture to, dine with and in some cases, share a log cabin with Federal judges.

I don't think any objective observer could examine FREE's operation and conclude that FREE seminars advance public confidence in the judicial branch. Indeed, editorials from over 30 major newspapers from across the country have harshly criticized FREE and "junkets for judges" generally. As Representative Lofgren has stated, "there is nothing more damaging to the citizens' faith in this country and due process of law than the belief, even if inaccurate, that those who are trusted to judge have been influenced by financial connections."

I must say that I am surprised and disappointed by the Judicial Conference testimony suggesting that Advisory Opinion 67 does not necessarily require any inquiry into the litigation activities of the funders of organizations like FREE. I think this is a very strained interpretation of the words of AO 67.

More importantly, ignorance, in this case, is not bliss. It is simply impossible for a judge to determine the propriety of attending a seminar without knowing whether the host is funded by corporations litigating before the judge. Respectfully, if AO 67 means what

the judiciary is suggesting, it means it is not worth the paper it is written on.

Let me turn to the issue of stock conflicts. Judges should never rule in cases in which they own stock as a party. This is the brightest line in the rules of judicial ethics and it is not a difficult rule to follow. That is why I think the Kansas City Star story on stock conflicts by district court judges and the Community Rights Counsel study on stock conflicts by appellate court judges are so remarkable. These reports and others done subsequently have all examined very small samples and found significant numbers of stock conflicts.

The judiciary has taken some steps to correct the problems with stock conflicts, but the judiciary rejected the single most important reform: the posting of publicly available recusal lists. Adopting your wise comment to the Kansas City Star, Chairman Coble, quote, "I don't think judges' financial holdings ought to be insulated from public knowledge." A theme running through both the stock conflict and junket stories, is the fact that judges' financial disclosure forms are inordinately difficult to obtain and too frequently omit required information. Unlike the other two branches of government, which allow immediate review of judges' public disclosure forms, the judiciary requires advanced notification of every Federal judge before releasing a form. This advanced notification takes weeks and hinders a review because litigants fear reprisal if a review becomes known by a judge.

Those obtaining judges' financial disclosure forms are often disappointed in their accuracy and completeness. Comparing judges' disclosure forms with a list of attendees obtained from FREE, Community Rights Counsel found that 13 of the 109 judges, 12 percent, that attended a FREE trip did not report the trip even after receiving a September, 1998 letter from the Financial Disclosure Committee warning, quote, "Judges who have accepted such trips and not reported them in their financial disclosure form should immediately file amended reports."

Underdisclosure is just as larg a problem. For example, in 1998, only three of 34 judges that reported attending a FREE seminar estimated the value of the seminar gift as required under Federal disclosure laws. Again, echoing your wise words, Chairman Coble, the time to quote—it is time to, quote, "get some sunlight into what appears to be a dark room," unquote.

Respectfully, I would recommend that the Committee ask the General Accounting Office to investigate the judiciary's compliance with Federal disclosure laws and make recommendations for improving the entire judicial disclosure process.

Thank you very much.

Mr. COBLE. Thank you, Mr. Kendall.

[The prepared statement of Mr. Kendall follows:]

PREPARED STATEMENT OF DOUGLAS T. KENDALL

Mr. Chairman and Member of the Committee: Thank you for conducting this important oversight hearing on the operation of federal judicial misconduct and recusal statutes. A bedrock of our system of government is the principle that no one—least of all a federal judge—is above the law. Judicial misconduct and recusal statutes help preserve the sanctity of this principle by ensuring that ethical and legal transgressions by judges are taken seriously, even if they do not rise to the level of an

impeachable offense. These statutes must function properly in order to protect the public trust and confidence upon which our independent judiciary rests.

I am the founder and Executive Director of Community Rights Counsel, a not-for-profit, public interest law firm located in Washington, DC with the mission of helping state and local governments defend land-use and environmental protections against court challenges. Surprisingly, CRC has also become deeply enmeshed in several issues pertaining to judicial ethics. I say surprisingly, because this was not supposed to be a substantial part of CRC's mission. CRC also regularly litigates in federal court, making it uncomfortable for us to also play the role of a judicial ethics watchdog organization.

CRC got involved in judicial ethics issues only after we learned that a corporate-funded outfit called the Foundation for Research on Economics and the Environment (FREE) located in Montana was hosting federal judges for week-long stays at resorts and dude ranches and teaching judges to be deeply skeptical about environmental laws and land-use protections. We have stayed involved in the subject because each place we looked, under every rock we turned, we have found troubling evidence of a problem. Our work has convinced me that the federal judicial misconduct and recusal statutes are not working as well as they should and that there is a need for vigilant oversight on this issue by Congress.

My testimony today will cover two topics that have been the subject of Community Rights Counsel reports: financial conflicts of interest and corporate-funded trips, what some have labeled "junkets for judges." While these problems are distinct, common threads run between them. Both problems illustrate the critical need for accurate and timely public financial disclosure by judges and the serious flaws in the existing disclosure system. Both problems also illustrate the need for effective penalties for non-compliance with ethical standards and the inadequacy of the current judicial disciplinary system in acting as a serious deterrent. Finally, corporate litigants—as the funders of the trips and the source of the financial conflicts—are at the center of both problems. This fact is disturbing because at the same time these junkets and stock conflicts have come to light, there has emerged a new form of judicial activism from our federal courts that is pro-market, hostile to government regulations and in keeping with the interest of these same corporations.

I. JUNKETS FOR JUDGES UNDERMINE PUBLIC CONFIDENCE IN THE JUDICIARY

Corporations and foundations that have a legal agenda in the courts are advancing this agenda by paying for free trips for federal judges to resorts and dude ranches. Once there, judges attend lectures making the case for curbing government regulation in favor of a free-market approach to matters like protecting the environment.

A. Corporations and Special Interests with Legal Agendas Should Not Be Permitted to Give Judges Gifts worth Thousands of Dollars

The problem with junkets for judges starts with the funding. Corporations and foundations with a legal agenda should not be permitted to fund, and thus shape, the legal education received by our federal judges. The fact that judicial education is being paid for by entities that have an interest in or are parties to federal litigation creates an appearance of improper influence and undermines public trust and confidence in the judiciary.

A July 2000 report by Community Rights Counsel, *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust*, (recently republished in the Harvard Environmental Law Review and available online at *www.tripsforjudges.org*) provides a comprehensive look at the problems posed by privately funded judicial seminars. *Nothing for Free* found that between 1992 and 1998 more than 230 federal judges—more than a quarter of the federal judiciary—traveled to resorts at the expense of private interests with a stake in federal litigation.

An April 2001 ABC News' 20/20 program, which focused on a trip hosted by George Mason's Law and Economics Center (LEC) at the Omni Tucson Golf Resort and Spa, perfectly illustrated this problem. The 20/20 program featured federal judges on the golf course and lounging poolside with cocktails. Several judges interviewed on camera called the trip a "vacation." Meanwhile, ABC News discovered numerous cases in which LEC's corporate sponsors were litigating before a LEC attendee.

Consider finally a recusal motion recently filed in a case called *Aguinda v. Texaco*. Lawyers for 30,000 Ecuadorian Indians sought to remove the judge hearing their $1 billion environmental case against Texaco after learning that Texaco had been a regular and substantial contributor to FREE, which hosted a junket attended by

the presiding judge. At the FREE trip, the former CEO of Texaco gave a lecture to the judge entitled "The Environment: A CEO's Perspective."

On the 20/20 program and elsewhere, judges have asserted that they were unaware of the corporate funding of FREE and LEC. For example, one judge told 20/20: "I have no idea where [LEC] gets its money." When asked by 20/20 whether he knew that LEC gets its money from corporations, another judge responded, "[LEC] didn't tell us that." When asked whether he had an obligation to find out, this judge responded: "Not necessarily, I mean because what's the difference?"

Advisory Opinion 67, issued by the Judicial Conference's Committee on Codes of Conduct, requires that judges investigate the sponsors and "source of funding" for any privately funded seminar before attending. A September 1998 report, prepared by the Committee on Codes of Conduct in response to a request by several members of this Subcommittee, reaffirmed that under Advisory Opinion 67, "specific information about the sponsor of the seminar, the source of funding, their involvement in litigation, the content of the seminar, and the judge's relationship to such litigation all bear on the question of whether a judge's participation is proper or improper under the Code of Conduct."

B. Corporations and Special Interests are Using Junkets to Advance a Legal Agenda

During an interview for 20/20, the Dean of the George Mason Law School frankly admitted that LEC is "out to influence minds . . . If court cases are changed, then that is something we are proud of as well." FREE is equally brazen about using its seminars to promote "free market environmentalism," a school of thought that embraces, in their words, "property rights, market processes and responsible liberty" and rejects "command and control" environmentalism.

Particularly troubling is the evidence that suggests that these private seminars are in fact changing court cases. CRC's *Nothing for Free* report documents a pattern of disturbing facts, including the following:

- In 10 of the last decade's most dramatic departures from established precedent in the area of environmental law, the judge striking down the protection took part in at least one junket.
- In six of these cases, the judge attended the trip while the case was pending.
- In at least three of these cases, the judge ruled in favor of a litigant bankrolled by the trip's sponsors.
- In one of the decade's most important environmental rulings, a judge ruled to uphold habitat protection, attended a seminar, came back, switched his vote, and wrote an opinion striking down a central component of the Endangered Species Act.

Even assuming that the remarkable correlation documented in *Nothing for Free* is complete coincidence, this correlation still creates an awful appearance problem for judges and the judiciary. As Representative Zoe Lofgren of this subcommittee stated eloquently at an oversight hearing three years ago when word of these trips first came to light:

> There is nothing more damaging to citizens' faith in the country and in the due process of law than the belief, even if inaccurate, that those who are trusted to judge have been influenced by financial connections.

C. Judicial Education Should Not Take Place in a Vacation Setting

The final problem with FREE and LEC junkets for judges is that they take place at resorts. Indeed, as noted above, several judges told 20/20 that they viewed the LEC seminar they were attending as a "vacation," a statement validated by footage of judges on the Omni Tucson's championship golf course.

The exotic locales of the FREE and LEC trips exacerbate the appearance problems stemming from these programs in several ways. Most obviously, even if corporate litigants were permitted to fund judicial education, they certainly should not be permitted to pay for judicial vacations. Additionally, however, the resort settings give FREE and LEC a competitive advantage over seminars hosted by the taxpayer-funded Federal Judicial Center. As Abner Mikva stated in a recent New York Times opinion piece:

> The federal judiciary has a Federal Judicial Center that provides educational seminars for judges on a wide range of legal topics. Since it uses taxpayer funds and answers to Congress, the program locales are not exotic, but the presentations are balanced.

Judge Rya Zobel, former Director of the Federal Judicial Center, echoed Judge Mikva in testimony before this Subcommittee: "we have offered annually a program

on environmental law, for example, in conjunction with Lewis & Clark University. The primary complaint we've had about that is that we work the judges too hard."

II. JUDICIAL STOCK CONFLICTS CANNOT BE TOLERATED

Over the last three years, news organizations and Community Rights Counsel have looked at different judges and different geographic regions and come to the same conclusion: judges are ruling far too frequently in cases in which they have a disqualifying financial conflict of interest.

A. Legal and Ethical Standards Are Unequivocal

The legal and ethical standards with respect to financial conflicts of interest could not be clearer. Judges cannot rule in a case in which he or she has a financial interest, period. This obligation is enshrined in federal law (28 U.S.C. §455) and the Canons of Judicial Ethics (Canon 3). It is enforced by a certification requirement which every judge must sign each year, subject to criminal and civil sanctions, certifying that:

> In compliance with the provisions of 28 U.S.C. §455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

Judges are required by the Canons to "keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse." (Canon 3(E)(2)). Judges must also "manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified." (Canon 4(D)(4)).

B. Studies Reveal Remarkable Numbers of Stock Conflicts

Perhaps the most dramatic results were found in a study published in 1998 by the Kansas City Star. The Star looked at district court judges in four courthouses in four states and found 57 cases in which a judge had issued one or more orders despite owning stock in one of the parties. Remarkably, in three of the four courts examined, at least half of the judges ruled in one or more cases in which he or she had a financial conflict of interest.

Following up on the Kansas City Star's series, Community Rights Counsel conducted a study to identify conflicts of interest among active federal appellate judges. Looking only at a single year and at rulings on the merits published in the Lexis® database, we identified eight judges that ruled in 17 cases in which they had a disqualifying financial interest (this study is available online at *www.communityrights.org*).

The results of CRC's study are particularly remarkable in light of the context in which they occurred. The disclosure forms we reviewed were filed after the Kansas City Star series and after receipt by each of the judges of an urgent letter from the Judiciary's Codes of Conduct Committee reminding them of the legal obligation "not only to be informed about his or her personal financial interests but also to make a reasonable effort to be informed about the personal financial interests of the judge's spouse and minor children."

Nevertheless, every judge identified in our study certified under penalty of criminal and civil sanctions that they had not performed any adjudicatory function in which they had a disqualifying financial interest. For each judge, this certification was apparently inaccurate and a simple search on Lexis® (available to every federal judge) would have revealed these conflicts. Moreover, each circuit court requires corporations to file a corporate disclosure form early in the appellate litigation process to ensure that judges can easily flag any financial conflicts. Our study strongly suggests that many judges are not taking their obligation to avoid financial conflicts seriously enough.

It is also troubling to note that in more than 80 percent of the conflict cases we identified, the judges in question ruled at least partially in favor of their financial interests. I do not view this as evidence that the judges were using their judicial power to advance their pecuniary interests. I am convinced that in the vast majority (if not all) of these cases, the conflict resulted from mere oversight. But I do find it very troubling when judges hold a great deal of stock in major corporate litigants, rule in favor of these litigants in most cases and, occasionally, rule in cases where they have a stock conflict. It certainly adds grist to the mill of those who argue that the judicial system is biased in favor of wealthy corporate interests.

Anyone who believes that the problem of stock conflicts has been solved in the aftermath of the Kansas City Star and Community Rights Counsel studies should review an August 2001 story published by the Times Leader of Wilkes Barre, Pennsylvania involving Senior Judge Edwin Kosik of the Middle District of Pennsylvania. Judge Kosik reportedly ruled in at least 10 cases in which PNC Bank appeared even though he owned stock in the bank. Remarkably, Judge Kosik admitted ruling in two bank cases in 1999 and 2000, after he realized the conflict and after he received a stern warning from the Codes of Conduct Committee about avoiding conflicts. Judge Kosik explained to the paper that his two rulings in favor of the bank required little decision-making and were not appealed. These explanations notwithstanding, Judge Kosik appears to have knowingly violated 28 U.S.C. § 455 and the judiciary should take this apparent violation of federal law seriously.

III. JUDGES' FINANCIAL DISCLOSURE FORMS ARE HARD TO OBTAIN AND OMIT REQUIRED Information

A theme running through both the stock conflict and junkets stories is the fact that judges' financial disclosure forms are inordinately difficult to obtain and, too frequently, omit required information.

A. The Disclosure Review Process Is Unduly Burdensome

Unlike the other two branches of government, which allow review and duplication of financial disclosure forms on the same day they are requested, the judiciary's Financial Disclosure Office notifies a judge in writing before granting access to a financial disclosure report. This advance notification seems contrary to the Ethics Reform Act of 1989, which establishes detailed procedures for the disclosure process and makes no allowance for such advance notification. Because most litigants would rather not risk upsetting a judge, advance notification creates a powerful deterrent to many potential reviewers. It also takes at least a week, and frequently over a month, for the Financial Disclosure Office to process requests for review of a financial disclosure form.

The Judiciary's resistance to making public disclosures easily available to the public is perhaps best illustrated by the Committee on Financial Disclosure's decision to deny a request for disclosures filed by an online publisher called APBnews.com. In late 1999, APBnews.com requested a copy of the 1998 disclosure forms for each federal judge and magistrate with the intent of publishing them on the Internet (something already done for members of Congress). APBnews.com paid for the copies, but while waiting for the reports, the Financial Disclosure Committee issued an indefinite moratorium on the public release of any disclosures, to anybody. Eventually the Financial Disclosure Committee lifted the moratorium, but permanently barred APBnews.com from obtaining copies of the disclosure forms.

This decision was in direct contradiction to federal disclosure law, which specifically permits use of the forms by "news and communications media for dissemination to the general public." As such, it drew bi-partisan ire on Capitol Hill, with Senator Charles E. Grassley (R-Iowa) terming it "an offense to the openness that helps define our system of government" and Senator Patrick Leahy (D-VT) stating: "The Judicial Conference should reconsider the scope of its decision, or Congress will have to do so." Editorial boards were even less kind, with major news organizations terming the decision "laughable," "infuriating," "tortured," and "embarrassing." Eventually, after APBnews.com filed suit and Chief Justice Rehnquist intervened, drafting a biting six-page memo critiquing the decision, the Judicial Conference overruled the Committee's decision.

B. Judges Routinely Omit Required Information

Those succeeding in obtaining judges' financial disclosure forms are often disappointed in the accuracy and completeness of the information conveyed therein.

For example, after publishing its series on stock conflicts in April 1998, the Kansas City Star reviewed the financial disclosure forms filed in May 1998 by the 33 judges included in their study. The Star found that one out of every three reports included information that by law should have been disclosed earlier. This new information led to the discovery of three additional conflicts of interest that were hidden by omissions in prior disclosure forms.

CRC made similar findings with respect to disclosure of judicial junkets. The laws and guidelines concerning what a judge must disclose to the public are clear and simple. Both federal law and Advisory Opinion 67 require that judges "report the reimbursement of expenses and the value of the gift on their financial disclosure reports."

Comparing financial disclosure forms with attendee lists prepared by FREE and LEC, CRC determined that at least 22 federal judges failed to report FREE or LEC

junkets, even after a September 1998 memorandum from the Financial Disclosure Committee warning: "Judges who have accepted such trips and not reported them on their financial disclosure forms in past years should immediately file amended reports." This represents approximately 11% of the judges that FREE and LEC report attending junkets during this same time period. Put another way, nearly one out of every nine federal judges apparently failed to report a privately funded trip even after a personal reminder about the requirements of federal law from the Disclosure Committee.

Under-disclosure is as large a problem as non-disclosure. Again despite clear mandates, judges' financial disclosure reports routinely fail to report all the information required. For example, in 1998, only 3 of the 34 judges who reported attending FREE seminars attempted to estimate the value of the seminar gift, as required under federal disclosure law.

IV. THE JUDICIAL DISCIPLINE SYSTEM ESTABLISHED IN 28 U.S.C. δ 372 IS NOT ACTING AS AN EFFECTIVE DETERRENT

Federal judges are taking trips funded by corporate litigants, ruling despite financial conflicts and omitting basic information from financial disclosure forms. One searching for an explanation need look no further than recent statistics from the Administrative Office of the U.S. Courts regarding judicial disciplinary actions pursuant to the process established in 28 U.S.C. δ 372. These statistics, summarized in an April 1998 story by the Kansas City Star, demonstrate that the judicial discipline system is not working effectively to deter ethical violations.

According to the Star, in fiscal years 1996 and 1997 more than 1,000 formal complaints were filed against federal judges nationwide. The chief judges' decided that not one of these cases required official discipline. Indeed, the chief judges failed to send a single complaint on to the next level in the complaint process; investigation by a committee of judges. In more than 450 cases, complainants appealed the dismissal of their complaint to the judicial council of an appellate court. These councils rejected every appeal.

Undoubtedly, many of these complaints were filed by disgruntled litigants and warranted no disciplinary action. But given the evidence that suggests that ethical transgressions do occur with some regularity, it strains credibility to suggest that not one of over 1,000 formal complaints warranted any official disciplinary action.

As every judge knows, the law only works if there are penalties for its violation. In the case of transgressions by judges of legal and ethical standards, there appears to be no effective deterrent. This is reflected in the persistence of stock conflicts and non-disclosures despite explicit rules and clear reminders from the Administrative Office. It is also reflected in the cavalier reaction of many judges to reports of improprieties. For example:

- Judge Tom Stagg of Louisiana responded to proof that he failed to disclose a junket by telling the Washington Post: "The food was wonderful; the teachers were wonderful. If somebody doesn't like it, I'm sorry."
- When the Kansas City Star confronted Judge Ancer Haggerty with evidence that his financial disclosure form omitted basic information on his stock holdings, he refused to detail his actual holdings claiming: "You are entitled to these reports, but that is all you are entitled to."
- When asked by the New York Daily News if he had read the financial disclosure form upon which the judge certified, inaccurately, that he had not ruled in any cases where he had a financial conflict, Judge Whitman Knapp replied: "Heavens, no! It wouldn't have any meaning to me."

V. CONCLUSION AND RECOMMENDATIONS:

I again want to commend the Committee for conducting this important oversight hearing. As described above, there is substantial evidence that suggests that the federal judicial misconduct and recusal statutes are not working effectively enough to prevent erosion of the public's trust and confidence in the judicial branch. Permit me to leave you with several recommendations for using this Committee's oversight authority in responding to the problems posed by judicial junkets, stock conflicts and non-disclosure.

Ban Junkets: In June 1998, several members of this Committee requested that the judiciary reevaluate Advisory Opinion 67, which currently sets the standard for judges on attending junkets. In September 1998, the Judicial Conference's Committee on Codes of Conduct responded by asserting that the criterion established in the Opinion was adequate to avoid the appearance of impropriety. Clearly this has not proven to be the case. The time seems ripe for another request for reconsider-

ation of Advisory Opinion 67. There is also a pressing need for clarification by the Committee concerning the type of inquiry Advisory Opinion 67 requires regarding the corporations and foundations that are the "sources of funding" for FREE and LEC trips.

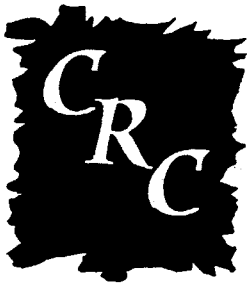
I also note that in the 106th Congress, Senator John Kerry (D-MA) and Senator Russ Feingold (D-WI) introduced legislation (S. 2990) that would have banned large gifts associated with privately funded judicial seminars. They have promised to introduce a revised bill this term and to fight for its passage. I urge members of this Committee to consider introducing legislation on this topic in the House.

Impose Penalties for Stock Conflicts and Non-Disclosure: There should be more effective penalties to enforce judges' disclosure obligations and the ban on ruling in cases in which a judge owns stock. For example, litigants discovering a stock conflict within some statute of limitations period should be able to vacate any adverse rulings and seek a new hearing before a judge without a conflict.

Post Recusal Lists at Local Courthouses: The Judicial Conference's Committee on Financial Disclosure considered and rejected a proposal that would have required judges to maintain an up-to-date "recusal list" available to litigants (without advance notification of the judge) at the clerk's office. This Committee should ask the Judicial Conference to reconsider implementation of this common-sense reform.

Make Financial Disclosure Forms Available without Advance Notification: The judiciary is currently seeking the extension of statutory authority (5 U.S.C. app. 4, § 105(b)(3)) for the Judicial Conference to prevent "the immediate and unconditional availability of [financial disclosure reports]" where release of the forms could endanger a federal judge. This is sound public policy, but this statutory provision strongly implies that where there is no danger to a particular judge, financial disclosure forms should be immediately available. This is never the case with judges' financial disclosure forms. As described above, there is always a lengthy advance notification process that significantly hinders public review of judges' disclosure forms.

An alternative procedure that seems to address the legitimate concerns of the judiciary would be as follows. Judges should annually file two versions of their financial disclosure forms: one for the Financial Disclosure Office and one for public review. Judges should be permitted to redact from the public review copy any information that is truly personal and sensitive (i.e. the judge's signature, any reference to the names of the judge's children, etc). These public review copies should then be made available immediately upon request. If the Judiciary, in consultation with the United States Marshal Service, decides that release of even this public review copy could endanger a judge, they should be permitted to further redact the report only to the extent necessary to protect the judge and only for as long as the danger to the judge exists.



Community
Rights
Counsel

Highlights of Media Coverage on Privately-Funded Seminars

Oversight Hearing on Operation of Federal Judicial Misconduct Statutes
November 29, 2001

"All the News That's Fit to Print"

The New York Times

CXLIX .... No. 51,494 Copyright © 2000 The New York Times MONDAY, AUGUST 28, 2000 ONE DOLLAR

A21

The Wooing of Our Judges

By Abner Mikva

CHICAGO

In a lifetime as a judge, lawyer and lawmaker, I can safely say I've encountered few judges guilty of outright dishonesty. Even when I started practicing law in Chicago in the bad old days, the number of crooked judges was small. But that is not what people believed then or believe now.

That is why so much is built into our judicial system — from the black robe and "all rise" custom to lifetime tenure for federal judges — to help foster the notion of judicial integrity. It all becomes meaningless, however, when private interests are allowed to wine and dine judges at fancy resorts under the pretext of "educating" them.

Between 1992 and 1998, according to a report from the Community Rights Counsel, a nonprofit public-interest law firm, more than 230 federal judges took one or more trips each to resort locations for legal seminars paid for by corporations and foundations that have an interest in federal litigation on environmental topics.

In the seminars devoted to so-called environmental education, judges listened to speakers whose overwhelming message was that regulation should be limited — that the free market should be relied upon to protect the environment, for example, or that the "takings" clause of the Constitution should be interpreted to prohibit rules against development in environmentally sensitive places.

Judges who attended the seminars wrote 10 of the most important rulings of the 1990's curbing federal environmental protections, including one that struck down habitat protection provisions of the Endangered Species Act and another that invalidated regulations on soot and smog. In six of these cases, according to the report, the judge attended one of the seminars while the case was pending before the court. And, the report reveals, many judges failed to disclose required information about these seminars on their financial disclosure forms.

> Free trips — and lectures on environmental law.

If an actual party to a case took the judge to a resort, all expenses paid, shortly before the case was heard, the judge and the host would be perceived to be acting improperly even if all they discussed was their grandchildren. The conduct is no less reprehensible when an interest group substitutes for the party to the case.

Of course it may be a coincidence that none of the seminars financed by private interests take place in Chicago in January or in Atlanta in July. It may be a coincidence that the judges who attend usually come down on the same side of important policy questions as those who financed the meetings. It may even be a coincidence that environmentalists are seldom invited to speak. But surely any citizen who reads about judges attending fancy meetings under questionable sponsorship will have well-founded doubts about their objectivity.

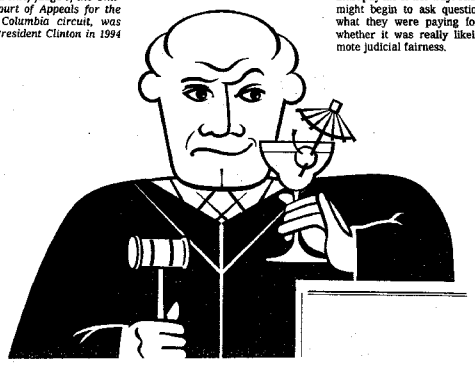
I know one federal judge who has been on a dozen trips sponsored by the three most prominent special interest seminar groups. I remember at least two occasions where judges on judicial panels where I also served took positions that they had heard advocated at seminars sponsored by groups with particular interest in the litigation.

The federal judiciary has a Federal Judicial Center that provides educational seminars for judges on a wide range of legal topics. Since it uses taxpayer funds and answers to Congress, the program locales are not exotic, but the presentations are balanced.

Unfortunately, the United States Judicial Conference, the governing body for all federal judges, has punted on the propriety of privately funded seminars, advising that judges assess their appropriateness "case by case."

Short of requiring judges to stick to federally sponsored seminars, the government could, at least, require that whenever a judge attends any professional seminar, the government must pay his or her way. Then citizens might begin to ask questions about what they were paying for — and whether it was really likely to promote judicial fairness. □

Abner Mikva, a former member of Congress and chief judge of the United States Court of Appeals for the District of Columbia circuit, was counsel to President Clinton in 1994 and 1995.



"All the News That's Fit to Print"

The New York Times

XLIX . . . No 51,522 FRIDAY, SEPTEMBER 15, 2000 ONE DOLLAR

A30

A Threat to Judicial Ethics

At a moment when the federal judiciary needs to tighten its ethical prohibitions on accepting money or gifts from private interests bent on influencing judicial thinking, Chief Justice William Rehnquist has been quietly collaborating with Senate Republicans to move in the opposite direction. With Justice Rehnquist's approval, Senator Mitch McConnell, Republican of Kentucky, tucked a provision into a spending bill in July that would lift the 11-year-old ban on judges' collecting honorariums for appearances. The ban was imposed in 1989 to protect the integrity and impartiality of the judicial system against outside influence.

It is not surprising that Mr. McConnell, the leading opponent of reforming the nation's corrupt campaign financing system, would be blind to the dangers of widening the opportunities for monied interests to buy favor with judges. But Chief Justice Rehnquist should know better than to endorse Mr. McConnell's scheme to weaken judicial ethics radically. The fact that in today's boisterous economy first-year legal associates in top law firms can make as much as a federal judge is no excuse to return to corruptive salary supplements from private interests. Nor is the failure of Congress to meet its commitment to adjust judicial salaries annually for inflation.

Indeed, as Abner Mikva, the former White House counsel and federal appellate judge, noted in a recent Op-Ed piece in The Times, the fairness and impartiality of the federal judiciary are already being seriously undermined by allowing federal judges to accept free vacations at posh resorts from private interests bent on influencing their future decisions. A valuable new report from the Community Rights Counsel, an environmental group, finds that between 1992 and 1998 some 230 federal judges — more than a quarter of the federal judiciary — traveled to resort locations at the expense of private interests with a stake in federal litigation. Once there, they attended legal seminars making the case for curbing federal regulatory authority in favor of a free-market approach to matters like protecting the environment.

These junkets seem to be having an impact on judicial decision-making. Ten of the past decade's most significant rulings cutting back on environmental protections, according to the study, were written by judges who attended these seminars, often while the cases were pending in court.

The need for reform was underscored a week ago when a federal district judge in Manhattan, Jed Rakoff, denied a motion to recuse himself from further involvement in a lawsuit seeking damages from Texaco for harming the rain forest in Ecuador. Lawyers for the plaintiffs — indigenous people who live in the rain forest — filed the recusal motion upon learning of Judge Rakoff's ill-advised participation in an expenses-paid seminar on environmental issues that had been held at a Montana ranch by a foundation receiving sizable donations from Texaco. One of the lecturers was Alfred DeCrane Jr., the retired chairman and chief executive officer of Texaco, who ran the company when it operated in Ecuador. In his ruling, Judge Rakoff argued that his acceptance of the travel gift was within existing rules, a hair-splitting explanation that does not remove qualms about his judgment or impartiality.

•

Federal judges should have the ethical compass to resist these one-sided "educational" seminars. But in the absence of judicial self-restraint, Chief Justice Rehnquist should be leading the United States Judicial Conference, the governing body for all federal judges, to crack down on such junkets, not nudging Congress to create new avenues for influence-peddling.

If judicial pay is deemed too low, Congress needs to address that problem directly, by granting judges a salary increase paid for with public funds. Similarly, if there is a genuine need for judges to attend educational seminars, Congress ought to provide public funds for that purpose, too. But the effort to lift the ban on honorariums for judges, which was brought to light yesterday by The Washington Post, should be rejected, either by Congress or by a presidential veto.

The Washington Post

SUNDAY, MAY 20, 2001

B6

Mr. Rehnquist on Junkets

CHIEF JUSTICE William Rehnquist argues that there is nothing wrong with federal judges attending educational seminars at posh resorts as guests of groups with purposeful ideological agendas. At a recent speech at the American Law Institute, Mr. Rehnquist failed even to acknowledge that such junkets look and smell bad. He instead attacked a bill from the last Congress that was designed to rein in such seminars, calling the proposal "antithetical to our American system and its tradition of zealously protecting freedom of speech." Please. The right of free speech does not include the right of public officials to be flown about the country at private expense, as any executive branch official can testify. Mr. Rehnquist's refusal to acknowledge any problem hurts the search for a reasonable solution.

The prior version of the bill, proposed by Sens. John Kerry and Russell Feingold, didn't quite represent such a solution. It would have prevented judges from taking trips paid for by private groups unless the programs in question were certified by the judiciary's educational arm as not undermining "the public's confidence in an unbiased and fair-minded judiciary." Attendance at approved seminars would have been funded by the judiciary itself. Mr. Rehnquist is right to worry about creating a layer of government to decide which seminars are adequately balanced. A newer version of the Kerry-Feingold bill, as yet unintroduced, contemplates correcting this problem simply by preventing judges from accepting travel and accommodation at privately run educational seminars altogether. It would create exceptions for seminars conducted at universities or by bar associations. This idea goes a long way to addressing the chief justice's stated concerns and would be a significant improvement over both last year's bill and the current rules.

The risk, however, is that it would cut off too much private judicial education. There is nothing wrong with private groups—even biased ones—holding seminars for judges. The problem starts when judges' attendance can be seen as largess by groups attempting to influence cases. Judges shouldn't be taking such gifts, but the government could provide an annual allowance for judges to spend as they wish on continuing legal education. Such an arrangement would discourage vacations disguised as seminars while allowing judges the freedom to seek education where they wish.

THE NATION'S NEWSPAPER 50¢ CENTS
14A
USA TODAY
NO. 1 IN THE USA
Tuesday, May 1, 2001

Just say no to judge junkets

The surroundings are lavish, the hosts who pay the tab are a mystery, and the names of those attending a secret.

Welcome to a junket for federal judges.

This week, they're being hosted at a Tucson golf resort, expenses paid by unnamed private groups to educate them about "science in the courts."

The seminar, organized by George Mason University's (GMU) Law and Economics Center, is one of several elite programs bankrolled by private groups that have strong interests in judicial rulings. For now, the seminars are funded by conservative, free-market interests, but as their popularity spreads — GMU has attracted nearly 500 judges — others may jump into the game.

It's no surprise that private groups would seek to influence judges. That hundreds of judges would go along threatens the notion of an independent and impartial judiciary.

Yet the U.S. Judicial Conference, the federal judges' governing body, blithely ignores the ethical traps such seminars pose. Last year, it opposed a sensible federal reform bill that would have set up a fund to pay judges' expenses to seminars that were vetted and approved by the Federal Judicial Center.

The conference offered no solution of its own, and its last advice came in 1998: Gifts of "tuition and expenses" are acceptable as long as the donor is not involved or likely to be involved in a lawsuit before the invited judge.

What if the judges don't know who's underwriting the lavish junkets? That's protection against perceptions that judges are being swayed, said a spokesman for the judges.

None of this quells the sense that the seminars are just a form of buying influence. The evidence:

▸ **Biased backing:** Past funders of GMU seminars' have free-market, corporate agendas on issues from the evaluation of scientific evidence to the size of punitive damages. While GMU now keeps its patrons secret, tax records show that more than $2.4 million in recent years came from conservative-leaning foundations. A small portion still comes from corporations, which GMU won't name.

▸ **Posh locales:** GMU locales have included Hilton Head, S.C., and Amelia Island, Fla. Other seminars organized by the Foundation for Research on Economics and the Environment, programs that stress free-market approaches to environmental issues, are held at a Montana ranch retreat. All amount to luxury gifts. Indeed, U.S. Court of Federal Claims Judge Diane G. Weinstein estimated the value of a two-week GMU seminar in 1997 at more than $7,300 on disclosure forms filed the next year.

George Mason maintains that its programs are balanced and that the resorts are cheaper locales than its campus. Perhaps.

But there are ways for judges to gain expertise without sacrificing their appearance of independence. The Federal Judicial Center offers tax-funded programs. And law schools, such as the University of Virginia, offer courses financed in large part by federal and state grants and given on campus.

Tighter ethics rules or new federal laws are needed to end this practice. Easier still, judges could just say no, recognizing that public confidence plummets when they accept expensive gifts disguised as education.

The Washington Post

THURSDAY, APRIL 9, 1998 A1

Issues Groups Fund Seminars for Judges

Classes at Resorts Cover Property Rights

By RUTH MARCUS
Washington Post Staff Writer

Federal judges are attending expenses-paid, five-day seminars on property rights and the environment at resorts in Montana, sessions underwritten by conservative foundations that are also funding a wave of litigation on those issues in the federal courts.

Funding for the seminars, run by a group called the Foundation for Research on Economics and the Environment (FREE), also comes from foundations run by companies with a significant interest in property rights and environmental law issues, Internal Revenue Service records show.

A 1996 letter to judges said the seminars "explore the role of property rights, incentives, and voluntary cooperation in achieving environmental goals," and noted, "Conference and travel expenses are paid and time is provided for cycling, fishing, golfing, hiking and horseback riding."

The seminars are held at the Gallatin Gateway Inn, a restored 1927 railroad hotel near Bozeman complete with its own casting pond, and Elkhorn Ranch near Big Sky, described in its promotional material as a "traditional dude ranch" one mile from Yellowstone National Park, where "the comfortably rustic guest cabins ... are built from hand-hewn native logs." Some judges bring spouses at their own expense and must pay for

See JUDGES, A12, Col. 1

Conservative Foundations Fund Resort Seminars for Federal Judges

JUDGES, From A1

some of the activities, like golfing.

FREE chairman John A. Baden said he would not release a list of judges who have attended the meetings. "Some judges just don't want that known," he said. A 1996 FREE list obtained by The Washington Post named 109 judges who have attended, and a listing of the four 1997 programs said one-third of the 900-member federal judiciary has attended or asked to enroll. Four more sessions, with 17 judges each, are scheduled for 1998.

Baden, who had previously organized seminars for academics, said he started the judicial seminars in 1992 because most federal judges lack a grounding in economic and environmental issues. "Federal judges are some of America's most important environmental decision-makers," he said.

In its literature, FREE says its seminars "are explicitly pro-environment," but also "explain why ecological values are not the only important values" and emphasize the "importance of secure property rights and the market process in the efficient and sensitive use of natural resources."

Two major sources of FREE attendees are the U.S. Court of Claims and the U.S. Court of Appeals for the Federal Circuit. Financial disclosure forms on file with the Administrative Office of the U.S. Courts and FREE's list show that 10 of the 24 judges on those two courts have attended the seminars since they began in 1992.

These courts are specialized bodies that hear most property rights cases against the federal government. In recent years, they have been the focus of intense efforts by conservative legal groups and businesses to secure a broader interpretation of the constitution's "takings" clause, which provides that government cannot take private property without "just compensation."

Property rights advocates and business groups have been pushing the idea that the takings clause should apply to any regulation that diminishes the value of private property, such as rent control ordinances, zoning regulations and environmental rules.

In the 1996 case, *Preseault v. United States*, the Federal Circuit expanded takings law when it ruled that a Vermont couple was entitled to compensation when an old railroad right-of-way on their property was converted into a recreational trail under the 1983 Rails-to-Trails Act—even though the property was already at risk of being used as a trail when they purchased it.

Four of the six judges who ruled against the government in *Preseault* reported on their financial disclosure forms that they have attended FREE seminars, along with one of the three judges who came down on the government's side. The John M. Olin Foundation, which gives money to FREE to support the judicial seminars, is also a financial backer of the New England Legal Foundation, which litigated the *Preseault* case.

"I don't really see any conflict of interest there," said Olin Foundation executive director James Piereson. "There might be a connection if we ourselves were orchestrating something in the courts."

Douglas Kendall of Community Rights Counsel, which helps local governments defend their activities against efforts by property rights advocates and provided information about the FREE seminars to The Post, called them "junkets for judges, sponsored by the same foundations that are bankrolling takings cases before the same judges. . . . At the very least, they create an appearance problem."

Baden called that a "totally uninformed" analysis by someone who knew nothing about the seminars, which he said involve at least 4½ hours of classes per day. "We have to make provisions for [recreational activities] every day because otherwise you just burn out," he said. "This is heavy-duty stuff."

One environmental lawyer who attended a FREE seminar last year on the Endangered Species Act said the program raised questions, particularly since he said liberal environmental groups lack the funding to put on similar programs for judges.

"The number of judges who have attended and its potential impact on a number of pending environmental cases are really significant issues," said Doug Honnold, of the Earthjustice Legal Defense Fund, formerly the Sierra Club Legal Defense Fund. "From my standpoint, one of the [illegible] exposed to a particular philosophical standpoint and with the express purpose of modifying results."

On the D.C. Circuit, which hears a significant number of environmental cases, among those listed by FREE as having attended are Judges James L. Buckley, Stephen F. Williams, A. Raymond Randolph and Douglas H. Ginsburg, who also serves on FREE's board.

Buckley said he found the seminars useful and had not been aware of FREE's funding. Randolph said he has attended two FREE seminars, describing them as "all business and very grueling." Randolph, who also chairs the U.S. Judicial Conference Committee on Codes of Conduct, said of the foundations funding both the FREE seminars and federal court litigation on takings, "It's not a problem I thought about until you called."

Judges commonly accept free travel and lodging from bar associations, law schools and similar organizations. A 1980 ethical ruling by a judicial advisory committee permitted judges to accept free lodging and transportation to educational seminars, even if they "may emphasize a particular viewpoint or school of thought."

However, the opinion added, "it would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of some litigation."

FREE is not the only group that sponsors judicial seminars. The Institute for Law and Economics at George Mason University Law School has for 24 years sponsored one- to two-week seminars for judges on law and economics, held at resorts in Arizona, California and Florida and funded by many of the same foundations that contribute to FREE. Nearly 40 percent of the federal judiciary have attended the seminars.

New York University legal ethics expert Stephen Gillers said he did not know about the FREE seminars in particular, but that in general, "the luxury of these trips is often apparent and the sponsors have a particular viewpoint that they want to see the judiciary advance and the content of the seminars promotes that viewpoint. I have always felt uncomfortable with the phenome-

'n Attendance at Foundation's Judiciary Courses

Following is a list of federal judges who have attended seminars sponsored by the Foundation for Research on Economics and the Environment from 1992 to 1996. The list is taken from a document prepared by FREE. Judges referred to by state serve on the lower federal court in that state; judges referred to by circuit serve on courts of appeals:

Harold Ackerman, N.J.; Carol Amon, N.Y.; Marvin Aspen, Ill.
Bobby Baldock, 10th Circuit; Harvey Bartle III, Pa.; Alice Batchelder, 6th Circuit; Edward Becker, 3rd Circuit; Peter Beer, La.; Fortunato Benavides, 5th Circuit; Danny J. Boggs, 6th Circuit; Michael Boudin, 1st Circuit; Dudley Bowen Jr., Ga.; W. Earl Britt, N.C.; Bailey Brown, 6th Circuit; Garrett Brown Jr., N.J.; Paul N. Brown, Tex.; James Browning, 9th Circuit; James L. Buckley, D.C. Circuit; Luckus Bunton III, Tex.
James Cacheris, Va.; Gregory Carman, Court of International Trade; Gene Carter, Maine; William Castagna, Fla.; Robert Cleland, Mich.; Edith Brown Clement, La.; Howell Cobb, Tex.; Suzanne Conlon, Ill.
Raymond Dearie, N.Y.; Robert G. Doumar, Va.; David Dowd, Ohio; Adrian Duplantier, La.
Robert Echols, Tenn.; B. Avant Edenfield, Georgia; Garnett Thomas Eisele, Ark.; Richard Enslen, Mich.
Bohdan Futey, Court of Federal Claims.
Paul Gadola, Mich.; Edward Garcia, Calif.; Douglas H. Ginsburg, D.C. Circuit; John Gleeson, N.Y.; Alfred T. Goodwin, 9th Circuit; Ralph Guy Jr., 6th Circuit.
Cynthia Hall, 9th Circuit; C. LeRoy Hansen, N.M.; Terry Hatter, Calif.; Hayden W. Head Jr., Tex.; Thomas Hogan, D.C.; D. Brock Hornby, Maine.
Dennis Jacobs, 2nd Circuit; James Jarvis, Tenn.; E. Grady Jolly, 5th Circuit; Edith Jones, 5th Circuit.
Jackson Kiser, Va.
Alfred Lechner, N.J.; Charles A. Legge, Calif.; Harry Leinenweber, Ill.; Ronald S.W. Lew, Calif.; Eugene Lynch, Calif.
Paul A. Magnuson, Minn.; Daniel A. Manion, 2nd Circuit; Boyce F. Martin Jr., 6th Circuit; H. Robert Mayer, Federal Circuit; Joe Billy McDade, Ill.; Gilbert Merritt, 6th Circuit; Thomas Meskill, 2nd Circuit; Paul Michel, Federal Circuit; Richard Mills, Ill.; James Moran, Ill.; Henry C. Morgan Jr., Va.; Diana Murphy, 8th Circuit.
Pauline Newman, Federal Circuit; Paul V. Niemeyer, Fourth Circuit; John Nordberg, Ill.
William O'Kelley, Ga.; Diarmuid O'Scannlain, 9th Circuit.
James Paine, Fla.; S. Jay Plager, Federal Circuit.
Randall Rader, Federal Circuit; Reena Raggi, N.Y.; A. Raymond Randolph, D.C. Circuit; Wilkes Robinson, Federal Claims; Jane Roth, 3rd Circuit; Gerald Rosen, Mich.; David Russell, Okla.
Charles Sifton, N.Y.; Eugene Siler Jr., 6th Circuit; Charles R. Simpson III, Ky.; D. Brooks Smith, Pa.; Jerry E. Smith, 5th Circuit; Loren Smith, Federal Claims; William Stafford, Fla.; Walter Stapleton, 3rd Circuit; Richard Stearns, Mass.; Joseph E. Stevens Jr., Mo.
Anne Thompson, N.J.; Gerald Bard Tjoflat, 11th Circuit; James Trimble Jr., La.; James Turner, Federal Claims; Jerome Turner, Tenn.
Roger Vinson, Fla; Kathryn Vratil, Kan.
John M. Walker, 2nd Circuit; Donald Walter, La.; Stephen F. Williams, D.C. Circuit; Thomas A. Wiseman, Tenn.; Alfred Wolin, N.J.; Charles Wolle, Iowa.
Robert Yock, Federal Claims.
Thomas Zilly, Wash.

Asked about FREE's funding, chairman Baden said, "We take money only from dead people. This money has to come from foundations, and the reason is obvious. I'm sure there are a large number of companies who would love to fund this program but I'm sure a company large enough to fund it would have many cases before the federal courts so there's a potential conflict."

FREE's 1997 annual report shows that it received $157,500 directly from corporations, in addition to $389,350 from foundations. Baden said the corporate money, whose precise sources he declined to identify, was used for general operating expenses such as salaries and rent, and other FREE activities, such as writing books.

A number of the foundations that fund FREE are also major givers to legal groups pressing property rights cases, including Defenders of Property Rights, Pacific Legal Foundation, New England Legal Foundation, Washington Legal Foundation and Institute for Justice.

One of the biggest contributors to FREE is the Carthage Foundation, headed by conservative publisher Richard Mellon Scaife, which has given $100,000 annually since 1993, according to IRS records, and has also been a major funder of such legal groups. Baden said the Carthage money was not used for the judicial seminars themselves.

The M.J. Murdock Charitable Trust, identified by Baden as the biggest supporter of the judicial seminars, gave $200,000 in 1994 to the Pacific Legal Foundation. That same year, PLF submitted friend-of-the-court briefs in two critical cases in the federal circuit that involved wetlands. The author of one the opinions, S. Jay Plager, has since attended two FREE seminars, according to financial disclosure forms. Plager also wrote for the court majority in the *Preseault* case.

"When I get invited to attend a conference ... I assure myself that the sponsor is not a litigant or potential litigant before this court and I assure myself that the sponsor is a charitable institution," he said. "Beyond that I do not ask and, indeed, I do not want to know the details because I'm aware that on both sides of the political spectrum one can find organizations and foundations that seek to pursue some of their objectives by encouraging education. As long as they do it in a nonpartisan and nonpolitical way, I see no problem with being educated."

Two foundations controlled by Charles and David Koch, conservative brothers who also run Koch Industries, an oil and gas company, have also contributed to FREE, including providing funding earmarked for the seminars. Koch Industries is currently being sued by the United States for violating the Clean Water Act.

FREE has also received funding from industry-run foundations, including Amoco, Burlington Resources and Shell Oil, all of which have an interest in environmental regulation. Baden said this money does not go to the judicial seminars.

U.S. District Judge Richard Stearns of Boston, a Clinton appointee who has attended two FREE seminars and is scheduled to lecture at a third in September, said, "I've never detected any attempt to indoctrinate" judges at the seminars. "I certainly wouldn't feel friendlier to someone because they contributed to an educational seminar. If that were their motive, it certainly isn't working."

Baden said the seminars present "a very wide range" of viewpoints on property rights and environmental regulation, saying, "The last thing that would make sense for judges who are used to hearing two sides is to only present one. That would be grossly counterproductive, I think."

The Washington Post

TUESDAY, JULY 25, 2000

Report Links Environmental Rulings, Judges' Free Trips

By GEORGE LARDNER JR.
Washington Post Staff Writer

Federal judges who attended expenses-paid seminars that favor "free market" solutions to environmental problems struck down protections in some of the decade's significant environmental cases, according to a study of the increasingly popular judicial trips.

Last year alone, the report said, nearly 100 federal judges—more than 10 percent of those active on the bench—flew off to a luxury resort for the sessions. The seminars are underwritten by conservative foundations, which in turn get their money from corporations and other pro-business interests.

"Corporate special interests are attempting to buy judicial influence at the highest levels, and it appears to be working," asserted Doug Kendall, executive director of Community Rights Counsel (CRC), a public interest law firm that studied privately funded trips taken by hundreds of federal judges from 1992 through 1998.

Among those singled out for criticism in the report, which was released yesterday, were judges Stephen Williams, David Sentelle and Douglas Ginsburg, all appointees of President Ronald Reagan to the U.S. Court of Appeals for the District of Columbia.

Williams drew fire for upholding habitat protection provisions of the Endangered Species Act in a 2-1 decision in July 1993, then attending two weeks later a week-long seminar run by the Foundation for Research and Economics (FREE) at "a traditional dude ranch" in Montana. On his return, Williams granted a rehearing in the case, changed his vote and wrote the opinion striking down the section of the law, which had been contested by logging companies and allied interests.

The Supreme Court voted 6-3 the next year to reverse Williams and uphold the law, which prohibited killing or injuring endangered species on private lands.

Williams's office said he was out of town. He did not return a call seeking comment.

At a news conference, Kendall said he was not claiming cause-and-effect between the seminars and the court decisions. He did argue the study produced strong evidence that the educational sessions had "some influence" on the judges who attended them.

Kendall said CRC gets its money from foundations such as the Rockefeller Family Fund that "care about environmental protections." He called on Congress to ban privately funded seminars for judges and let the courts rely exclusively on the 33-year-old Federal Judicial Center.

> "Corporate special interests are attempting to buy judicial influence at the highest levels."
>
> — **Doug Kendall**
> Community Rights Counsel

Run by a board of judges, the center conducted 843 educational programs for judges and court staffers last year.

FREE Chairman John A. Baden, who described himself as "pro-environment," took issue with characterizations of his group's seminars as one-sided, and said they regularly included speakers from groups such as the Environmental Defense Fund and Defenders of Wildlife. He said in an interview that judges who attend "tell me these are the most stimulating and balanced programs they attend."

A "desk reference" book for federal judges published by FREE offers a view of pollution as a cost produced by both the polluter and the victim because "your steel mill would do no damage if I (and other people) did not happen to live downwind from it."

Asked what he thought of Judge Williams's decision in the 1993 case, Baden said: "I don't pay attention to cases."

The CRC listed FREE and two other "right of center" organizations—the Law and Economics Center at George Mason University and the Indianapolis-based Liberty Fund—as dominant in the field of private judicial education.

In a foreword to the study, Abner Mikva, former chief judge of the D.C. Circuit, stressed the need to avoid even an appearance of impropriety. He said steps to protect judicial integrity "all become meaningless when private interests are allowed to wine and dine judges at fancy resorts under the pretext of 'educating' them about complicated issues."

Kendall was highly critical of a 1998 trip to a FREE seminar by Williams (his third) and Ginsburg (his seventh) after they had been assigned to a case the American Trucking Association brought against proposed clean air health standards for soot and smog. In that case, now before the Supreme Court, they voted to strike down the standards.

Ginsburg, who according to the report is a member of FREE'S board of directors, was out of town and did not return a call seeking comment.

The report criticized Sentelle for a 1996 appellate ruling denying a challenge to a proposed tax credit for a gasoline additive on the grounds that wider use could harm wildlife and water supplies.

Sentelle, who did not attend a FREE seminar until 1998, denied the challengers' standing, the report said, because they had not shown a "demonstrably increased risk of serious environmental harm" and a link between that risk and their "particular interests."

Sentelle's office said he was not in, and he did not return a call seeking comment.

Mikva, a former White House counsel as well as judge, said rules are stricter in the executive branch.

"Whenever we were invited to attend or speak at a private gathering, the government paid our way," he said. "Federal judges could use such a prophylaxis. If the judges want to go traveling, let the government pay for the trip."

The Washington Post

FRIDAY, JUNE 30, 2000

Judges' Free Trips Go Unreported

U.S. Jurists Say They Forgot To Comply With Ethics Law

By JOE STEPHENS
Washington Post Staff Writer

Federal judges took more than a dozen expense-paid trips to seminars put on by conservative groups but failed to disclose the resort trips on their annual financial reports, as required by federal ethics laws, documents and interviews show.

The excursions, some of which lasted two weeks and cost thousands of dollars, were devoted to discussions of economics and the environment. But the privately financed sessions also offered judges time for golf and horseback riding at the island resort and historic Western retreats where they were held.

The judicial seminars have become controversial since The Washington Post reported on them two years ago. Some public interest groups have called for judges to turn down the trips, complaining that the sponsors accept funding from corporate foundations and conservative organizations that have an interest in federal litigation.

The judges who didn't report the trips said they weren't trying to hide them, they simply forgot to list the excursions when filling out their annual reports.

"It just slipped through," said Judge Michael Boudin of the 1st U.S. Circuit Court of Appeals in Boston. He failed to report that he took a two-week trip to Hilton Head Island, S.C., sponsored by the Law & Economics Center.

See JUDGES, A10, Col. 1

No Disclosure

Following are federal judges who are named on lists of people attending seminars in resort locations. None of the judges listed the trip on his or her annual personal financial disclosure report for the relevant year.

- Judges referred to by **state** serve on the lower federal court in that state.
- Judges referred to by **circuit** serve on courts of appeals.

Judge	Court
Marvin E. Aspen	Illinois
Bobby Baldock*	10th Circuit
Peter Beer	Louisiana
Stanley F. Birch Jr.**	11th Circuit
Michael Boudin	1st Circuit
James L. Buckley	D.C. Circuit
B. Avant Edenfield*	Georgia
Paul Gadola*	Michigan
Edward J. Garcia	California
Richard W. Goldberg	International Trade
Ralph Guy Jr.	6th Circuit
Charles A. Legge**	California
Boyce F. Martin Jr.**	6th circuit
Michael B. Mukasey	New York
Graham C. Mullen	North Carolina
John S. Rhoades	California
G. Kendall Sharp*	Florida
Tom Stagg	Louisiana
Anne E. Thompson	New Jersey

* Did not return phone calls from The Post.
** Cannot remember who paid for the trip.

SOURCES: Law & Economics Center, Foundation for Research on Economics and the Environment.

THE WASHINGTON POST

Judges' Free Trips Unreported

JUDGES, From A1

District Judge John S. Rhoades of San Diego attended two Law & Economics Center seminars but disclosed neither. "I goofed," he admitted. But the judge said he had no qualms about accepting such gifts.

"They're in nice places," Rhoades said of the seminars. "I learned a lot. Like, if you build a car and make it absolutely safe, can anybody afford to buy it? Stuff like that."

A review of seminar participation lists obtained by The Post shows at least 19 judges who did not publicly disclose attending the sessions. Although judges need not report every event they attend, federal law directs them to disclose any gift or expense reimbursement valued at $250 or more.

The sponsors of the trips—the Law & Economics Center at George Mason University and a Montana nonprofit known as the Foundation for Research on Economics and the Environment (FREE)—acknowledged in interviews that they picked up travel, lodging, food and tuition expenses for virtually every participating judge.

Twelve of the nondisclosing judges confirmed in interviews that the sponsors paid their way to 14 seminars held at various resorts; three other judges acknowledged attending but said they could not remember who picked up the cost. Four judges did not respond to requests for clarification.

Ethics experts said they knew of no instance where a judge had been disciplined for not disclosing a trip.

As their financial disclosure forms have come under increased scrutiny in recent years, federal judges have balked at making them publicly available, as required by law. The judges have cited security concerns in arguing that the forms—which contain no addresses or telephone numbers—should not be posted on the Internet. Last month, Chief Justice William H. Rehnquist announced that the judiciary may seek to amend the nation's disclosure laws.

"The problem is not that the judges are disclosing too much," complained Doug Kendall, who heads the Community Rights Counsel of Washington, a public interest law firm that provided lists of seminar participants to The Post. "Judges are omitting basic information."

After the first news reports about the seminars two years ago, the policymaking U.S. Judicial Conference reminded every judge of the disclosure law. "Judges who have accepted such trips and not reported them on their financial disclosure forms in past years should immediately file amended reports," warned a memo.

News reports and the warning prompted nine judges to belatedly amend their forms; at least three others did so within the last year. Others continued to ignore the warning.

As of January 1999—the last date for which reports were readily available—about one out of every nine judges on the seminar participation lists had failed to disclose taking part, Kendall said. Among them was Judge Richard W. Goldberg, one of several whose names appeared on the original warning sent to judges.

Goldberg, of the Court of International Trade in New York, at the time sat on the judiciary's disclosure committee. Goldberg acknowledged last week that he "probably" should have reported his 1992 trip to Tucson, paid for by the Law & Economics Center.

Judges who did report the gifts included few details. In fact, the office that receives the disclosure forms has advised judges not to list the dollar value of the trips.

In September 1996, records show, Judge Bruce Selya of the 1st U.S. Circuit Court of Appeals in Rhode Island wrote the judge who oversaw the disclosure office to offer thanks "for pointing out that the actual dollar amount of expense reimbursements is not required" on the reports.

A long-standing opinion issued by a Judicial Conference committee holds that judges must report the dollar value of all gifts, including those of tuition and other expenses associated with seminars. Kendall said his group scoured the disclosure reports of 34 judges who reported attending FREE seminars in 1998 and discovered only three listed a gift value.

A spokesman for the Administrative Office of the U.S. Courts said the office's position is that federal law requires public officials to disclose the value of "gifts" and not of "reimbursements."

Whatever the law, judges still should disclose the cost so the public can gauge the potential conflict of interest, argued Stephen Gillers, a legal ethicist at New York University. "Without it, the user of the information cannot know the generosity that the judge enjoyed," he said.

Some judges acknowledged in interviews that they took along their spouse or a child, but all said they paid for the additional expenses. Ralph B. Guy Jr. of the 6th Circuit Court of Appeals in Ann Arbor, Mich., said that between classes at a FREE seminar he enjoyed an afternoon of horseback riding. Then he and his wife remained in Montana for a few days after the seminar to soak up the rustic scenery.

"I know it's controversial, but I'm perfectly willing to admit I went," Guy said. "That should have been reported. It's an oversight on my part."

Seminar sponsors describe their programs as unbiased courses on the basic principles of economics and science. Most judges agreed, although a few described the sessions as emphasizing a corporate or conservative viewpoint.

The Law & Economics Center is offering six week-long institutes this year, covering topics that include "Real Science vs. Junk Science" and "The Assault on Scientific Truth." The center will spend about $4,500 on each judge attending its programs, said program director Francis H. Buckley.

Private foundations cover most of the costs, he said, but he refused to identify them. The center's financial backers have included the Ford Motor Co. Fund, the Procter & Gamble Fund and the conservative Sarah Scaife Foundation.

The center says one-third of the current federal bench has attended its seminars, held at resorts in places such as Amelia Island and Marco Island in Florida. Participants have included Ruth Bader Ginsburg and Clarence Thomas (both attended before ascending to the Supreme Court) and 67 members of the federal Court of Appeals.

At FREE, the cost of housing and feeding each judge runs about $180 a day, an official said. The group also pays for transportation, speakers' expenses and other costs.

FREE seminars have been held at a restored 1927 railroad hotel near Bozeman, Mont., and at Elkhorn Ranch, Mont., a traditional dude ranch outside Yellowstone National Park. A 1996 letter from FREE describes its seminars as focusing on "the role of property rights, incentives, and voluntary cooperation in achieving environmental goals."

The letter added: "Conference and travel expenses are paid and time is provided for cycling, fishing, golfing, hiking and horseback riding."

FREE has accepted funding from the Carthage Foundation, headed by conservative publisher Richard Mellon Scaife; foundations controlled by Charles and David Koch, conservative brothers who run an oil and gas company known as Koch Industries; and foundations associated with Amoco, Burlington Resources and Shell Oil.

FREE Chairman John A. Baden said money from those foundations was not spent on the seminars, a distinction that did not quiet critics.

"If judges need education, taxpayers should fund it," said Mike Casey, vice president of the Environmental Working Group of Washington, a watchdog organization. Casey described the trips as "influence peddling" on behalf of anti-environmental forces. If education is needed, Casey said, "Send them a book; send them a tape."

Tom Stagg, a district judge in Shreveport, La., dismissed complaints about propriety and said he was eager for a second stay at an island resort.

"The food was wonderful; the teachers were wonderful," Stagg said of his 1993 trip to Hilton Head for a Law & Economics Center seminar. "If somebody doesn't like it, I'm sorry."

ABC News 20/20 Transcript of "Junkets for Judges" Segment, April 6, 2001

abcNEWS.com

Junkets for Judges

Three o'clock on a glorious Tuesday afternoon in Tucson, Arizona

It's the middle of the workday for most people.

But here at one of the top golf courses in the country, a group of U.S. federal judges, their courtrooms and black robes far away, is finishing up the ninth hole.

Brian Ross: Afternoon

Across the fairway, two other federal judges, from Iowa, where it was cold and snowy on this December day, are heading for a tough par 5.

Brian Ross: How was the game.

Judge Edmonds: Oh we are not done. We're just on the third hole.

And at the swimming pool, there's a federal judge from Ohio doing laps, while another one, from California, leisurely catches up on some sun and the newspapers, all part of an educational program that others call an entirely inappropriate junket

Brian Ross: You wouldn't call this a junket?

Judge Osteen: I wouldn't,.. oh, no. Well, it depends what you mean by junket.

They're all here for the week at the luxurious Omni Tucson, along with about a dozen other federal judges, courtesy of a little-known but well-financed organization which finds golf resorts a nice place to help educate the judges.

Dean Mark Grady: That's a very useful place to have a conversation in my experience.

Each year about one in ten federal judges will attend similar private gatherings at some of the finest resorts in the country, virtually free, sponsored by a handful of groups which get their money from big corporations and pro-business organizations, with a lot more in mind than just a few rounds of golf.

Doug Kendall: This is the way corporate America is lobbying the judiciary—teaching judges to rule as if they were a corporate CEO.

Doug Kendall is the director of The Community Rights Counsel, a non-profit environmental group that has linked the judges' seminars with what it calls the ten most dramatic rulings against environmental protection laws.

Doug Kendall: We found that in all ten of those cases the judge writing the opinion had been to at least one of these junkets. In six of those ten cases, the judge was attending a junket while the case was pending before them.

One of them, a case involving the timber industry and a federal judge, who after attending one of the private seminars, completely reversed an earlier position, to the benefit of the timber industry. Although the Judge denies the seminar affected his decision.

Doug Kendall: He came back, he switched his vote and he wrote the opinion striking down a critical portion of the Endangered Species Act.

It turns out that corporations and pro-business groups have quietly been spending millions of dollars to finance such lavish outings for judges.

Here in Tucson, after a morning of classroom lectures, the judges headed to lunch poolside.

At taxpayer expense, U.S. Marshals were assigned to guard the judges throughout the week, although they never did spot our 20/20 undercover team.

This particular seminar was sponsored by what's known as the Law and Economics Center, run out of the law school of George Mason University in suburban Washington, a school whose pro-business teachings have made it a favorite among many corporate executives.

Doug Kendall: That's the niche that George Mason fills.

The judges' week included seven separate sessions, which the school says offer differing viewpoints and that over the years have included Nobel prize-winning economists.

But others call the sessions here a kind of ideological boot camp.

Doug Kendall: It's famous as a conservative, right wing law school

One lecturer this week in Tucson was a professor who calls himself an anarchist economist, well known for his views about who is responsible for industrial pollution.

Doug Kendall: What he says is that if the neighbor didn't live by the steel company the pollution wouldn't be hurting or killing anyone. It's as much the neighbor's fault as it is a corporation's fault. And so you have part junket, part biased seminar and problems on both ends.

But the judges we talked to on the golf course had nothing but praise for the seminars, including Judge William Osteen of North Carolina.

Judge William Osteen: George Mason does a terrific job.

Brian Ross: Why do they hold it here, instead of at their campus in Washington, D.C.?

Judge Osteen: You'll have to ask them about that. I don't know.

Brian Ross: Could it be the weather, do you think, and the golf course?

Judge Osteen: I don't know about that. You'll have to ask them.

Brian Ross: Well, what do you think?

Judge Osteen: I don't have any thoughts about that.

Federal magistrate Paul Zoss and bankruptcy judge William Edmonds, both of Iowa, said they had earned the right to a little relaxation, even if they didn't know who paid for it.

Judge Zoss: Well, we worked all morning. I haven't taken a vacation all year.

Brian Ross: Is this your vacation?

Judge Zoss: Yeah, this is my vacation.

Judge Edmonds: Yes, this is a vacation.

Brian Ross: And who pays for it?

Judge Edmonds: Um, it's the Institute.

Brian Ross: And where do they get their money, do you know?

Judge Zoss: I have no idea.

In fact, the corporate sources of the money are not made public by the George Mason law school, which is located a long way from the golf courses of Tucson, in the suburban sprawl of Arlington, Virginia.

No seminars for judges are held here.

Dean Mark Grady: These are academic retreats. What could be more natural than for a law school to seek to train academic judges?

Brian Ross: Why does it have to be at a golf course?

Dean Grady: It is a retreat.

Dean Mark Grady, who rejects the conservative label many have attached to his law school, says he cannot understand why anyone would object to the programs for federal judges--which he says are unbiased--or why anyone would raise questions about the source of the money.

Dean Grady: It comes from major corporations. That's right. I'm not, I'm not disputing that it comes from major corporations. And in fact, I

Brian Ross: Which ones?

Dean Grady: Which major corporations? It comes from a variety of major corporations.

Brian Ross: Can you give me the names of your three or four biggest?

Dean Grady: We do not publicize our, our, our sources of funding because the academic program stands on its own feet.

The corporate names used to be publicized until 1994, around the time criticism of the program began.

The list was a who's who of Fortune 500 companies--many with numerous cases before the federal courts--and also included a foundation run by a reclusive, ultra conservative multi-millionaire...Richard Mellon Scaife, best known for financing investigations of President Clinton's personal life.

But the Dean refused to talk about who is on the list now, including Scaife.

Brian Ross: Does it include the Scaife Foundation?
Dean Mark Grady: Does it include the Scaife Foundation? As I say we do not publicize our sources.

But our 20/20 investigation found tax documents showing Scaife, through the foundation he runs, continues to help pay for the judges' free trips, some 150-thousand dollars last year alone.

Dean Mark Grady: To be honest with you I don't understand why you're making such a big production out of this. Where are you going with this? What difference would it make if the Scaife Foundation or any other foundation donated to these programs?

A significant difference, in the view of two leading ethics experts we talked with. Judges are allowed to attend such seminars but the two experts say, under the ethics rules for judges the Judges have a responsibility, to determine who's paying for their free week at the golf resort to avoid possible conflicts with pending cases.

The week after the seminar, Judge Osteen of North Carolina was assigned a major case involving the Philip Morris company, which at least in the past, was publicly listed as giving money for the George Mason seminars. Phillip Morris refuses to say if it still contributes.

Judge Osteen: I have no idea where they raise their money, but it comes through there.

Brian Ross: And have you understood they receive it from corporations, from conservative, non-profit groups?

Judge Osteen: No, I have not understood that.

Judge Biggers: They don't tell us that.

Judge Neal Biggers of Mississippi.

Brian Ross: Don't you think you ought to find out?

Judge Biggers: Not necessarily, because what's the difference? I, if I don't know who is paying for it, then I am not going to be affected either way by it, who, by who it is.

Brian Ross: Well, aren't you affected by who they choose to speak to you?

Judge Biggers: Not at all, it's an educational thing.

At night, in Tucson, the money from Richard Scaife and others pays for the day's final activity, cocktails and dinner on the veranda, all part of the plan to make everyone comfortable.

And all, according to one distinguished former judge, creating for those on the outside the appearance of improper and unethical behavior.

Judge Abner Mikva: I think judges should realize that, that they don't have that much credibility to spare.

As chief judge of the powerful DC Circuit Court of Appeals for years, Abner Mikva says he was appalled to see many of his own colleagues, good judges he says, being wined and dined by corporations in the name of judicial education.

Judge Abner Mikva: The appearance of impropriety is considered as important as the impropriety itself. I don't care if the judge can pass a lie detector test to prove that he wasn't reached. And it doesn't matter how the judge rules. What matters is that the people who have to accept that decision as having been made on the merits are suspicious.

And our 20/20 investigation also found many judges attend more than one of the free seminars, including James Jarvis of Tennessee. This was his fifth seminar.

When we talked to him in Tucson, he wanted to stress that judges pay their own greens fees.

Judge Jarvis: There's no sin in playing golf as far as I know and I paid for this, I paid for this.

Brian Ross: Who paid for the room?

Judge Jarvis: Well, George Mason paid for the room.

Brian Ross: And who paid for the airplane ticket.

Judge Jarvis: Well, I paid for them, but I expect to be reimbursed.

Judge Jarvis told us he had no idea who the corporate sponsors were, but our 20/20 investigation found that since he began attending the seminars, Judge Jarvis has presided over at least six cases involving large

corporations, all of which confirmed to us they were at the time helping to pay for the George Mason seminars.

Judge Jarvis says any suggestion that he is being influenced by the free trip or the classroom courses is wrong.

Judge Jarvis: I can understand that you all could spin it that way if you want to; I mean that's your business, you're in the news business.

And the judges from Iowa said they regarded the seminars as a valuable educational experience but that they couldn't possibly be influenced by a free vacation.

Judge Zoss: Nobody has tried to influence me. I know that.

Brian Ross: Subtly, perhaps?

Judge Zoss: I don't think I'm influenceable.

But the judges may not know just what their hosts have in mind, then. The law school dean openly boasts of trying to influence the thinking of federal judges at the private luxury seminars.

Dean Mark Grady: We're proud of that.

Brian Ross: So you're out to change the judges' minds?

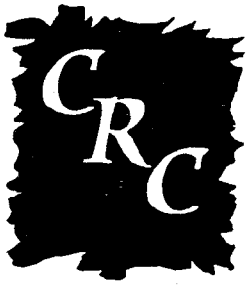
Dean Grady: We are, yes, we are, we are out to influence minds.

Brian Ross: And if court cases are changed as a consequence?

Dean Grady: If court cases are changed, ah, then, ah, that is something that we are proud of as well.

And by the most recent count, at least 550 federal judges in this country, including two Supreme Court justices, have quietly accepted free trips to the George Mason luxury seminars.

Judge Mikva: Most of the time we think about judges with more respect and more deference than we think about elected officials. I want to keep that distinction. We don't want judges to be considered as just another bunch of politicians.



Community
Rights
Counsel

Highlights of Media Coverage on Stock Conflicts

Oversight Hearing on Operation of Federal Judicial Misconduct Statutes
November 29, 2001

The Washington Post

MONDAY, SEPTEMBER 13, 1999 A26

Judges' Financial Disclosures

LAST YEAR, THE Kansas City Star ran a series of stories outlining the widespread and illegal practice among federal judges of hearing cases when they own stock in one of the parties to the litigation. The law could not be clearer on this point. As the Judicial Conference put it in a memo following the series, "A decision to disqualify [oneself] based on financial interest is mandatory under the [law] and cannot be waived by the parties." Yet the Judicial Conference also declined, in light of the series, to change the rules governing the availability of judges' financial disclosures. Judges' financial statements are not available at courthouses. To get them, litigants must order them from Washington, and the judges are tipped off when someone requests their disclosures. In other words, a litigant who requests such information risks angering the judge hearing his case.

Today, Post staff writer Joe Stephens reports on a follow-up to the Kansas City Star series (of which he, incidentally, was the author) that was conducted by an environmental litigation group called the Community Rights Council. The CRC study took a snapshot of the federal appellate bench. Looking at cases decided in 1997, the CRC found that of 149 judges, eight heard cases in which they had disqualifying financial interests in a party. While the cases affected are a tiny percentage of the federal appeals docket, the judges involved constituted 5 percent of the appellate bench and included some of the most prominent and well-respected jurists active today. The report also, in all likelihood, understates the problem. The CRC looked at only one year, ignored senior judges and corporate subsidiaries, and considered only cases that could be found using the Lexis online service. The group's finding suggests that the problem of judges illegally hearing cases in which they have conflicts of interest is, as the Kansas City Star series also found, serious.

Though the problem probably results from carelessness, not corruption, the consequences for the public perception of the federal justice system are not to be underestimated. Consider the case of Judge Alice Batchelder of the U.S. Court of Appeals for the 6th Circuit. Judge Batchelder heard several cases in 1997 involving Wal-Mart. One was an appeal of the dismissal of a suit by the father of 19-year-old who bought a gun from the chain and used it to commit suicide. Judge Batchelder, whose husband owned stock in Wal-Mart, served on a panel that affirmed that dismissal. Though there is no particular reason to suspect her holding in the company affected her judgment in the case, such conflicts look terrible and leave lingering questions about whether justice was really done.

The Judicial Conference should reconsider its decision not to make disclosures easily available at courts. The judiciary has cited privacy and security as its reasons for notifying judges when their disclosures are accessed. Neither reason is persuasive. These are public documents. While judges are presumably not intentionally flouting the law, their failure to recuse themselves with sufficient regularity implies that litigants should more easily be able to bring conflicts to their attention.

The Washington Post

FRIDAY, DECEMBER 17, 1999

A40

Judges and Disclosure

WHAT JUDGE on the Judicial Conference's Committee on Financial Disclosure would not balk if a litigant advanced as audacious a misinterpretation of federal law as the one the committee itself has adopted with respect to disclosure of judges' financial interests? The committee this week decided to withhold from an online publisher called APBnews.com the 1998 financial disclosures of all federal judges. It determined that Internet publication would threaten the security of judges. And though the law requiring the public disclosure in no sense permits the judges—having made such a judgment—simply to refuse access, they have done so anyway.

The committee's stated rationale is that publication on the Internet would make it impossible to comply with a requirement that disclosures be given only in response to a written application stating the requester's name, occupation and address, and certifying that he is aware of certain prohibitions on the use of the reports. The application must also give the name and address of those people or organizations on whose behalf the reports are being requested.

The committee reads this requirement to preclude publication on the Internet, since the Judicial Conference would not know—and would not be able to inform the judges—who had access to the reports. The committee also contends that a new provision permitting the redaction of individual judges' disclosures when "revealing personal and sensitive information could endanger that individual" permits the wholesale denial of access to APBnews.com.

This reading of the statute is laughable—and infuriating for being advanced by the arm of government charged with faithful interpretation of the law. The statute specifically contemplates that a news organization will use the disclosures in order to publicize their contents. Among the various prohibitions on the use of the disclosures, in fact, are "any commercial purpose, *other than by news and communications media for dissemination to the general public* [emphasis ours]."

In recent years, various news organizations—including The Post—and a public interest group have used judges' financial disclosures to highlight the problem of judges hearing cases when they own stock in one of the litigants. Judges may not like Congress's requirement that their disclosures be fully public. But that does not give the judiciary the right to amend the law.

14A · MONDAY, DECEMBER 27, 1999 · USA TODAY

Today's debate: Releasing judges' data on Web

Judges aim to rise above laws requiring public disclosure

OUR VIEW **In latest setback, online publisher's bid to post data is denied.**

In an era when most public officials are telling more about their personal and financial lives, federal judges would rather tell less.

This month, a panel of judges gaveled down an online publisher's request to place documents listing their personal finances on the Internet. They insist release could create security risks — even though the documents already are public and reveal little personal data.

The president and members of Congress disclose their finances, and their reports appear on the Web. But judges, at times, seem to forget that they are public officials, too. Indeed, the move to block Internet access is just the latest brickwork in a two-decade effort to wall off federal judges from disclosure laws.

The first obstruction came not long after the disclosure law was passed in 1978. Judges began requiring that the name of anyone requesting a disclosure report be sent to that judge. Then in 1989, Congress dropped a requirement that forced judges to make the reports available in each courthouse. They were gathered in a single Washington office, and judges promptly started defending access delays by saying the office was too small.

Last year, came another constraint: A Senate amendment allowed judges to black out information from a report if it "could endanger" them. According to a Senate aide, judges informally sought the change, citing heightened security concerns.

The result of weaker disclosure is to leave conflicts of interest masked. Last fall, for instance, a Washington public interest law firm reviewing disclosure forms found that federal appeals judges had ruled on cases involving companies in which they owned stock. *The Kansas City Star* reported similar conflicts among trial judges.

Yet, in the new round of obstruction, a judicial panel is denying access to about 1,600 reports — the 1998 disclosures of all federal judges and magistrates — to online publisher APBnews.com. The panel says a mass release could endanger judges and would frustrate Congress' intent to permit a "security determination" before each release of a judge's report.

It's a tortured reading of the law. The judges' own regulations envision the media disseminating the reports to the "general public." Newspapers have done it for years; *The Kansas City Star* and a New York TV station post some reports on the Web. Do the judges suggest that each viewer file a request, then wait before looking at them?

While judges may face risks in making tough rulings and sentencing criminals, those concerns can be answered in far less restrictive ways. Judges already can screen out risky information, even to excess.

The judges have not cited any incident in which disclosure led to danger, and their adamant refusal makes it look, as a federal judge put it, "like we are hiding something."

As federal judges wield more power over every aspect of the nation's life, citizens rightfully want to know about their financial interests and potential conflicts. And the Web is the ideal vehicle.

APBnews.com sued the judges last week to overturn the denial, and two senators are threatening to force Internet disclosure if the judges don't.

Good. Far better if the arbiters of the nation's laws followed the law themselves.

Behind the bench

A 1978 law requires federal judges to file financial reports publicly each year. The reports list a wide variety of information, including:

- ▶ Outside income from speeches, books and teaching jobs
- ▶ Income from a spouse's job
- ▶ Stocks, mutual funds and retirement accounts
- ▶ Gifts, such as paid travel to conferences
- ▶ Loans

Judges are not required to report:

- ▶ Home address
- ▶ Social Security number
- ▶ Birthdate
- ▶ Names of spouse or children

Source: USA TODAY research

The Washington Post

MONDAY SEPTEMBER 13, 1999

Judges Rule on Firms in Their Portfolios

Appeals Jurists Attribute Participation to Innocent Mistakes

By JOE STEPHENS
Washington Post Staff Writer

A number of federal appellate judges have ruled on cases involving companies in which they own stock, despite a federal law designed to prevent judges from taking part in any case in which they have a financial interest.

An examination of financial disclosure reports and federal court records shows that in 1997 eight appeals court judges took part in at least 18 cases in which they, their spouses or trusts they helped manage held stock in one of the parties. The stock ownership ranged from a few thousand dollars to as much as $250,000.

In interviews, the judges acknowledged that they should not have participated in the cases but stressed that their stock interests did not affect their rulings. The judges, who include some of the nation's best-known jurists, attributed their participation in the cases to innocent mistakes or memory lapses about their financial portfolios.

"It's embarrassing; I should have been more alert," said Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals in California. "I certainly am going to try to be more careful."

Some of those involved in the cases also were upset to learn about the stock. Judge Alice

See JUDGE$, *A4, Col. 1*

Judges Issue Rulings Involving Firms in Their Portfolios

JUDGES, From A1

Batchelder of the 6th Circuit in Ohio improperly sat on a case involving Wal-Mart Stores Inc. even though her husband held up to $50,000 worth of stock in the company. Batchelder and two other judges ruled the discount-store chain could not be held responsible for selling Wayne Brashear's 19-year-old son a .357 Magnum revolver, which he later used to commit suicide.

"It leaves a pretty bitter taste," Brashear said of the judge's actions.

Batchelder explained that, until contacted by a reporter, she did not realize her husband's retirement account owned stock in Wal-Mart and other companies. She said she should have withdrawn from Brashear's appeal and four other cases.

"I'm extremely chagrined to discover it," she said. "The error is mine."

The conflicts were uncovered by Community Rights Counsel, a public-interest law firm that concentrates on land-use issues. The group reviewed 1997 personal financial disclosure reports, the most recent available at the time, filed by the approximately 150 active federal appeals court judges, and checked the holdings against computerized records of cases in which the judges participated. It provided the material to The Washington Post.

"Our findings represent the tip of the iceberg, and there are likely hundreds of similar cases to be found throughout the federal judiciary," said the group's executive director, Doug Kendall.

But David Sellers, a spokesman for the Administrative Office of the U.S. Courts, said the conflicts involved a surprisingly small percentage of the roughly 52,000 cases that passed through the nation's appeals courts in 1997. He also questioned why seven of the eight judges cited by the group were named by Republican presidents.

Kendall said he scrutinized all judges equally. He said his study understated the probable number of conflicts because it did not include cases handled by judges who have taken retired status and did not include an exhaustive search of corporate subsidiaries.

In interviews, the judges said their rulings in the cases were unlikely to affect their stock values. In some cases, in fact, the judges ruled against the companies' interests. Even so, they acknowledged that they should have withdrawn from the lawsuits to prevent a conflict.

"I accept the responsibility. I shouldn't have sat on those cases," said Judge Morris Arnold of the 8th U.S. Circuit in Arkansas. "I regret the mistake happened and I'm going to work to see it doesn't happen again."

Arnold took part in one lawsuit involving General Electric and another involving a General Electric subsidiary while his wife owned company stock worth up to $50,000. He said he overlooked one conflict because the case had dozens of litigants. In the other, he said, he did not recognize that General Electric Capital Corp. was a subsidiary of General Electric.

Some judges said their spouses or investment managers bought the stocks without immediately notifying them. Others said the companies' names became lost in a long list of litigants or that they were confused by the names of subsidiaries and affiliated corporations.

Federal appeals court rules require corporations to provide a list of all parent companies and related entities in order to prohibit precisely such conflicts.

Federal law requires that judges remove themselves from any case in which they know they or their spouses have a financial interest, no matter how small. Even a $1 investment violates the statute. Federal law also directs judges to keep abreast of what they own so that they may immediately resolve any conflicts that arise.

Evidence of the conflicts was not news to one judge, Laurence Silberman of the U.S. Circuit Court of Appeals for the District of Columbia.

Silberman said he identified a series of conflicts in early 1998 and sent letters reporting the problem to the lawyers in three cases. At the same time, Silberman withdrew from hearing an appeal in one of the most closely watched cases in recent years—the U.S. Justice Department's antitrust lawsuit against Microsoft Corp.

Silberman said he had no ownership in Microsoft or the companies involved in the other cases. But after his brother-in-law died suddenly in 1997, Silberman explained, he became a trustee of the Gaull Marital Trust, which owned a variety of stocks, including up to $100,000 in Microsoft.

In his letters, Silberman noted that his "participation was in violation" of federal ethics laws.

In 1997, Silberman received $15,000 for teaching at Georgetown University Law Center and was one of three judges who ruled in Georgetown's favor in a case accusing the university hospital of medical malpractice. Silberman said it was "absurd" to think he should remove himself in that situation, noting the hospital and law school are separate entities. Legal ethics experts said he was not required to disclose the letter by vice president Mike Casey.

Judge Arnold called it a good idea to make judges' financial disclosures more readily available to the public.

"I understand why some people would be reluctant" to check the reports if they know their inquiries will be reported to the judge, Arnold said. "If it's a matter of public record, it's a matter of public record, and people ought to be able to look at it."

In March the Judicial Conference rejected a plan to have judges post "recusal lists" at local courthouses, citing security and privacy concerns. Judges also said that such lists already are available to anyone willing to fill out a request and wait several weeks.

Kendall and other critics point out, however, that each request results in a warning to the judge about who is examining his finances. They said few lawyers and litigants would risk angering the judge who will decide the outcome of their case.

The Environmental Working Group, an environmental watchdog organization, wrote to Chief Justice William H. Rehnquist last week urging him to improve the disclosure process, including posting the forms on the Internet. "Litigants and citizens' faith in the judicial process is severely eroded by these conflicts," said judges should be easily available to the public. In March the Judicial Conference rejected a plan to have judges post "recusal lists" at local courthouses, citing security and privacy concerns. Judges also said that such lists already are available to anyone willing to fill out a request and wait several weeks.

Taking Stock on the Bench

Federal appeals court judges with conflicts of interest:

Morris Arnold of the 8th Circuit in Arkansas
- Took part in one lawsuit involving General Electric, and another involving a General Electric subsidiary, while his wife owned company stock worth up to $50,000.

Alice Batchelder of the 6th Circuit in Ohio
- Took part in five lawsuits involving Wal-Mart Stores Inc. and Bristol-Myers Squibb Co. while her husband's retirement account held up to $50,000 stock in those companies.

Edward Becker of the 3rd Circuit in Pennsylvania
- Said his clerk overlooked his stock ownership in one case involving Hercules Inc. In a second, said he mistakenly believed he had already sold the stock, worth up to $15,000.

Alex Kozinski of the 9th Circuit in California
- Ruled for General Motors in a case brought by railroad workers who claimed hearing damage from GM engines. Said his wife bought GM shares midway through the case and that he only learned of the purchase later.

Sandra Lynch of the 1st Circuit in Massachusetts
- Married a man who owned up to $100,000 in Monsanto Co. stock a few weeks before joining a ruling in a case involving Monsanto. Said she did not learn of her husband's stock until later, and did not realize the problem with the case until called by a reporter.

Daniel Manion of the 7th Circuit in Indiana
- Participated in a lawsuit involving Lucent Technologies while holding company stock worth up to $15,000. Manion pointed out that early in the appeal the litigant's name was listed as AT&T. Later, it was changed to Lucent.

Bruce Selya of the 1st Circuit in Rhode Island
- Participated in three cases while owning stock worth up to $15,000 in a litigant's or a litigant's parent company. Said the problems arose because his investment manager bought stocks for his portfolio and only later supplied him with the names of the companies.

Laurence Silberman of the D.C. Circuit
- Participated in three cases involving companies in which a trust he administered held stock. Wrote letters to the parties saying his involvement violated federal ethics rules.

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Page 1A SUNDAY, AUGUST 12, 2001

Judge on spot in stock holdings

Two say they plan to seek new trials in suits because Judge Edwin Kosik owned stock in PNC Bank, a party to their cases.

By JENNIFER LEARN-ANDES
jandes@leader.net

Senior U.S. District Judge Edwin Kosik has heard several cases during the last decade involving PNC Bank and its holdings, despite a federal law that says federal judges must remove themselves if they or their spouses own stock in parties involved in the court proceedings.


Kosik

Kosik reported on his financial disclosure forms that he had joint ownership of PNC stock since 1992. The stock was worth $15,000 or less and ·is annual divi- l income of $1,000 or less, the forms say.

Even a $1 investment violates the federal statute. Congress imposed the clear, rigid requirement under section 455 of U.S. Code, Title 28, in 1974 to eliminate interpretation federal judges.

Two area residents who had legal proceedings against PNC or its holdings in the mid-1990s say they are outraged that Kosik did not automatically recuse himself as required, and they both plan to pursue federal actions seeking new trials.

"This is obstruction of justice," said Daniel Kenia, a certified public accountant and one of the owners of Stone Hedge Properties.

Stone Hedge sued PNC and other parties in 1995 over a defaulted loan to build a golf course and residential development near Tunkhannock. Kosik, who presides in U.S. District Court in Scranton, dismissed the suit, prompting Kenia and his partners to question Kosik's loyalties to PNC.

Nanticoke resident Ann Paveletz said she had no idea Kosik owned PNC stock while hearing her 1994 employment discrimination suit against First Eastern Bank, which was acquired by PNC in 1993, although she suspected something was wrong when he pushed for a settlement instead of a jury trial.

"He had no right to hear my case," Paveletz said.

Kosik said he knew about the federal requirement at the time of both cases, but he typically heard cases involving PNC as long as there were no objections from either party. He said he disclosed his financial interest to lawyers and told them to forward that information to their clients to make sure there wasn't any opposition.

But Douglas Kendall, executive director of the Washington, D.C.-based Community Rights Counsel, said stock ownership is an "unwaivable conflict."

"You can't get permission to make an exception," said Kendall, whose not-for-profit, public-interest law firm monitors judicial ethics issues.

Although he vows that his stock ownership had no impact on his rulings, Kosik said he stopped hearing any cases involving PNC in 1999 when the U.S. Judicial Conference must avoid conflicts of interest. The warning was largely prompted by media reports of federal judges across the country who presided over lawsuits against companies in which they had a financial interest.

"Ownership of as little as a single share of stock in a corporate party is disqualifying," the memo said. "The judge cannot handle the case even with the parties' consent."

A review of Kosik's case log shows he has presided over at least eight other court proceedings from 1992 through 1998 that list PNC and its holdings, First Eastern Bank and Northeastern Bank, as parties in the proceedings.

That review does not include the Stone Hedge or Paveletz suits, and First Eastern was not counted as an ineligible Kosik case until after 1993, when the bank was acquired by PNC.

Difference of interpretation

Though declining to comment on Kosik, Cynthia Gray, director of the American Judicature Society's Center for Judicial Conduct in Chicago, agreed with Kendall's interpretation of Section 455.

"A federal judge may not hear a case if the judge knows the judge's spouse owns stock in one of the parties, even if it is only one piece of stock," said Gray. Her center is a national clearinghouse for information about judicial ethics and discipline.

A search of Kosik's caseload reveals he has presided over at least two cases involving PNC since the U.S. Judicial Conference warning was put out — a foreclosure filed by PNC in 1999 and a Civil Rights Act violation claim against PNC Bank in 2000.

Kosik said he heard the cases because they were actions that required little decision making.

In the foreclosure, Kosik granted PNC's motion for a default judgment against *Allan F. Hill Jr.*, Baltimore, and unknown heirs. Kosik said the default judgment meant Hill and the heirs were sued and didn't make any attempt to respond.

Kosik dismissed the 2000 civil rights claim filed by Brian G. Slack of Stroudsburg "for lack of subject matter," court records show. "It didn't belong in federal court, and my decision wasn't appealed," Kosik said. Slack could not be reached for comment.

Kosik said he doesn't believe there is a problem with him hearing either case, although he acknowledged that there could be room for debate.

Kendall said the law doesn't give judges leeway in hearing cases based on the expected complexity or seriousness of the court proceeding. Section 455 of the U.S. Code says a court proceeding "includes pretrial, trial, appellate review, or other stages of litigation."

"That's not the way the law works. There's nothing in ethical guidelines that says you can make a minor rule in a case you think is frivolous. You don't have that authority. It's not your case to judge," Kendall said.

Kendall said Section 455 ethical guidelines "could not be more clear."

"There is no more bright line a rule in judicial ethics as the one that you cannot rule in a case in which you own stock in parties involved. It's as crystal a federal law as there can be," he said.

Kosik said he agrees with the reasoning behind Section 455, and he has instructed court clerks in recent years to send him no cases involving PNC or other companies in which he and his wife invest.

"I agree with the rule. I don't look for any cases. They are assigned at random," Kosik said.

Problems with the system

Section 455 also applies to the financial interests of a federal judge's minor children who live at home, and the statute requires judges to make a "reasonable effort" to keep abreast of the personal financial interests of their spouses and children.

Judges attest that they have obeyed Section 455 when they report their financial interests on a disclosure report filed with the U.S. Judicial Conference, Committee on Financial Disclosure.

At the end of the form, judges certify that they "did not perform any adjudicatory action in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children has a financial interest" in compliance with Section 455.

Kosik signed these forms, which included the PNC stock, in 1993 through 1998, the most recent years that could be obtained in time for this article. Kosik acknowledged he still owns the stock, which his wife inherited from an uncle.

The financial disclosure form says anyone who knowingly or willingly falsifies the report is subject to civil and criminal sanctions, but Kendall said that rarely, if ever, has happened.

Parties involved in a court proceeding can file a recusal motion if they suspect a judge is violating Section 455, but that's no help to people such as Kenia and Paveletz, who found out about Kosik's financial interests years after their court actions were over.

Kendall and media outlets throughout the country have pushed for more public access to the financial disclosure forms. The U.S. Judicial Conference requires judges to be notified of all requests for their forms, which some say discourages people from seeking the information.

Suggestions have included Internet postings or local federal courthouse postings of forms, but Judicial Conference staff counsel George D. Reynolds in Washington, D.C., said the notification requirement is still in effect. He referred further comment to the Judicial Conference press office, which did not return calls.

Kendall said ethical complaints can be filed against judges for violating Section 455, but he knows of no instances in which such action has resulted in disciplinary actions.

"The system is broken in many different respects, including redress, which is why it's important that judges follow the law in the first place," Kendall said.

Kendall said the recusal requirement might seem extreme, but Congress concluded that there was no way to measure how much financial interest could sway a judge's decision.

He advises judges against owning stock in companies that frequently appear in court in their districts, especially if they don't want to transfer a lot of cases to fellow judges.

"The financial interest here is small, so it's unlikely that the judge is gaining because of this, but that's not the issue. The issue is whether by law he can sit in on cases involving PNC, and the law says he can't," Kendall said.

Mr. COBLE. Now I am going to skip over you, Mike, because I have indicated earlier, we have been assigned two additional Members of this Subcommittee to replace vacancies that occurred when Congressman Scarborough and Congressman Hutchinson departed. The distinguished gentlelady from Pennsylvania, Ms. Hart, is coming aboard what Mr. Delahunt and Mr. Berman and I view as the best Subcommittee of the House Judiciary Committee Subcommittees.

Ms. Hart, I have upstaged you, but I know you wanted to recognize your former professor. So why don't you do that at this time, and we will hear from Professor Hellman.

And then we will get back to you, Mr. Remington.

Ms. HART. Thank you, Mr. Chairman. I just wanted to say, it is wonderful to be on this Committee. I was hoping that I would get to choose it on the first round. I was, unfortunately, too far at the end of the line, not that I am pleased that Representatives Hutchinson and Scarborough had to leave, but I am not bothered by the fact that there were vacancies on the Committee and I was able to fill one. So it is an honor to be here, Mr. Chairman.

It is also an honor to introduce to the Committee and those here today a gentleman whose reputation has been, I think, widely known throughout the legal world for quite a while. His reputation, when I was a law student, was also widely known.

I was a student at the University of Pittsburgh during Arthur Hellman's tenure. While he is still teaching law, he has somehow found the time to become quite a distinguished authority on court systems, the Federal court system, as well, especially. And he is a professor of law at the University of Pittsburgh and distinguished faculty scholar at the University Pittsburgh School of Law.

I graduated from that university's school of law an unnamed number of years ago and have found that in my career of public service, my law degree and the things that I learned there, especially as far as procedural issues, have served me quite well. I was a State Senator for 10 years, as I know Professor Hellman knows well, and also now I am a freshman here.

But I must note that Professor Hellman, though widely known and widely published, has also been—and I am not making this up—widely loved by the students at the University of Pittsburgh School of Law, because those who study the law know, it can be quite dry. He does have a way—by the way, I was not one of his students, but several of my closest friends were—and was quite an entertaining and engaging professor. And that is a very good thing.

I want to thank you for taking the time to be with us today to share your knowledge with us on the Committee.

And I would like to thank the Chairman for indulging me. Thank you.

Mr. COBLE. I thank the gentlelady. As I said earlier, Judge Osteen was my former boss and was always very evenhanded and fair with me, so I have no score to settle with him.

Professor, if you were not evenhanded and fair with the lady from Pennsylvania, that may be your problem. But we will recognize you for 5 minutes, Professor.

STATEMENT OF ARTHUR D. HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you, Mr. Chairman. And, of course, I did say in my statement that I do not speak for any institution or official body, but I think I do speak for the University of Pittsburgh School of Law in saying how proud we are to have one of our graduates not only in the United States House of Representatives, but serving on the Judiciary Committee and this particular very important Subcommittee.

In the Judicial Conduct and Disability Act of 1980, Congress provided a mechanism for identifying and correcting judicial misconduct without intruding on judicial independence. In my view, the basic framework of that act is sound. But even the best of systems require reexamination to consider the lessons of experience and to meet changes in conditions or even perceptions over a period of time.

Now, in my written testimony, I've suggested some amendments to the statute that are grounded in the experience of, now, more than 20 years. These involved matters of detail, although I would not call them technicalities. They are more than that; and I hope we will have a chance to discuss these in the question period. But I would like to turn now to some of the broader issues raised by the statute.

A good place to begin is with the statistical report published each year by the Administrative Office. Now, I have attached to my statement as Table 1 a compilation of the AO's figures over the last 6 years. And one thing stands out from those figures: The overwhelming majority of complaints are dismissed, either by the chief judge or by the judicial council reviewing the chief judge's order.

I think a natural reaction to those figures would be: surely Federal judges, good as they generally are, can't be that good. Either some of the would-be complainants are not taking advantage of the statutory procedures or the courts are sometimes failing in their duty to act when judges fail to live up to the high standards we expect of them.

Now, neither of those possibilities can be ruled out, but before we jump to conclusions, I think it is important to emphasize that the formal mechanisms of the statute are not the only methods for dealing with misconduct or disability in the Federal judiciary.

First, the figures do not reflect the informal corrective processes that may take place in the absence of a formal complaint. And that is a fascinating aspect of this system.

Second, many instances of judicial misconduct are dealt with through appellate review in particular cases. A good example is the Microsoft case that made the headlines just a few months ago. I also believe that in the long term, the most effective and efficient method of maintaining integrity in the Federal judiciary lies in rigorous scrutiny at the appointment stage, and we have that rigorous scrutiny today.

Yet, having said all that, I also have to say that the statistical record is not as reassuring as it could be and as it should be. And the reason is that the judiciary has not done enough to make the complaint process visible.

Now, it seems to me that there is one step that could go a long way toward increasing that visibility. The suggestion is that the Web site of every Federal court should include a prominent link to the rules and the forms that govern the filing of a complaint under section 372(c) concerning a judge of that court.

I think the Internet can also be helpful in many other ways, but I see that my time is almost up and there is one other matter I would like to touch upon. This hearing, which deals with judicial disqualification, is as good an opportunity as there will ever be to call the Subcommittee's attention to a minor statutory malfunction that otherwise is going to remain forever below everybody's radar.

Section 46(c) of title 28 provides that en banc rehearing can be ordered by a majority of the circuit judges who are in regular active service. And the circuits are divided on whether majority means a majority of all active judges—that is to say, an absolute majority—or a majority of the judges who are not recused. Five of the circuits follow an absolute majority rule. In those circuits, recused judges are having an effect on case outcomes that, by definition, they should not be having. And this is hardly a major problem but it is one that is easily corrected.

I would urge the Subcommittee to read the opinion of Judge Carnes that I have cited in my statement. He analyzes the issue in detail. And I would urge you to take appropriate action, perhaps by drafting an amendment to be included in the next omnibus judiciary legislation.

In conclusion, these are a very important set of issues that have been raised here. And I hope we have the opportunity to ventilate them in detail.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Professor.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Mr. Chairman and Members of the Subcommittee:

I appreciate your invitation to express my views at this oversight hearing on federal judicial misconduct and disqualification. By way of personal background, I am a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh School of Law. Among other subjects, I teach courses in Federal Courts and Constitutional Law. I have published numerous articles, monographs, and books dealing with various aspects of the work of the federal courts.

Over the years, I have been privileged to participate in a number of institutional enterprises aimed at improving the administrative of justice, both state and federal. I served as Chair of the Civil Justice Reform Committee of the American Judicature Society, and I supervised a distinguished group of scholars in analyzing the innovations of the Ninth Circuit and its court of appeals. More recently, I served on the Ninth Circuit Court of Appeals Evaluation Committee appointed by Chief Judge Procter Hug, Jr. Of course, in my testimony today I speak only for myself; I do not speak for any court or other institution.

This statement is in six parts. Part I introduces the statutory scheme for judicial discipline; it also calls attention to some of the resources available to the Subcommittee as it pursues its oversight responsibilities. Part II discusses possible amendments to the existing statute that warrant consideration at this time. Part III addresses some of the longer-range issues raised by the statute, and Part IV provides a brief assessment of the current operation of the system. Part V deals with judicial disqualification. It offers a better approach to disclosing judges' conflicts of interest, and it flags a statutory ambiguity involving recusal by court of appeals judges. The statement concludes with brief comments on the Internet as a tool for safeguarding judicial integrity without interfering with judicial independence.

I. INTRODUCTION

A. Section 372(c) and the delicate balance

The federal judicial system is the envy of civilized nations throughout the world. Its stature rests in large part on two essential features: judicial independence and judicial integrity. For the most part, judicial independence and judicial integrity reinforce another. In one respect, however, there is a tension between the two. Because human beings are fallible, it is generally accepted that some mechanism is required to identify and correct instances in which particular judges have strayed from the norms of "good behavior." But if the process is too bureaucratic, too heavy-handed, or too quick to move to formal adjudication, it poses a threat to the judges' independence.

In the Judicial Conduct and Disability Act of 1980 (hereinafter "the Act"), Congress sought to reconcile the competing values. I believe that the Act—codified in section 372(c) of the Judicial Code—strikes an appropriate balance, and that the basic framework established in the statute is sound. But no product of human invention can be perfect. Moreover, even the best of systems may require modification to meet changes in conditions or perceptions over a period of time.

One element of the compromise that produced section 372(c) was the assurance of continuing legislative oversight. More than a decade has now passed since Congress last conducted a thorough examination of the operation of the system. Additionally, the emergence of the Internet as a ubiquitous vehicle for communication calls for rethinking of procedures established in the pre-Internet era. It is therefore appropriate and timely for this Subcommittee to conduct an oversight hearing on the operation of the Act and related issues of judicial misconduct and judicial discipline. And I am grateful for the opportunity to take part in this important endeavor.

Section 372(c) raises a wide range of issues, including deep questions of constitutional law associated with the process of impeachment and the possibility of prosecuting federal judges under criminal laws. I will concentrate here on the more mundane—and more common—issues growing out of the everyday operation of section 372(c) and the work of judges, chief judges, and circuit councils.

B. Resource materials for Congressional oversight

In pursuing its oversight responsibilities on issues of judicial misconduct and judicial discipline, the Subcommittee can benefit from the work of several institutions that have labored in this field over the past 20 years.

First, the Judicial Conference of the United States has promulgated Illustrative Rules Governing Judicial Misconduct and Disability. These Illustrative Rules address many procedural and substantive issues that are not addressed by the statute itself. They have been revised several times over the years, and they reflect the lessons of experience nationwide.

Second, each of the federal judicial circuits has adopted rules based on the Illustrative Rules. As it happens, the circuit I am most familiar with is the Ninth Circuit. The Ninth Circuit's rules, available on the circuit's web site, *http://www.ce9.uscourts.gov/*, include detailed commentaries on the purpose and operation of the rules. I have drawn on the Ninth Circuit's rules in preparing this statement. References are to the version dated August 21, 2000.

Third, the National Commission on Judicial Discipline and Removal, established by Congress in late 1990, submitted a detailed report in August 1993 on a variety of issues relating to the 1980 Act and problems of judicial misconduct. The Commission was chaired by Robert W. Kastenmeier, former Chairman of this Subcommittee and author of the Judicial Conduct and Disability Act of 1980. The Commission's report is published in 152 F.R.D. 265 (hereinafter "NCJDR Report").

Fourth, the Federal Judicial Center, the research arm of the federal judiciary, carried out an empirical study at the behest of the National Commission. See Jeffrey N. Barr & Thomas E. Willgang, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980,* 142 U. Pa. L. Rev. 25 (1993) (hereinafter "FJC Study"). This is a thorough, objective, and thoughtful piece of research that is enormously useful in showing how the Act has been implemented at the everyday operational level. I have drawn heavily on it here.

One other preliminary point warrants mention at this stage. Section 372(c) as currently written generally uses masculine pronouns. For consistency and ease of reference, I have followed suit here. If the statute is amended, Congress could take the opportunity to make all references gender-neutral.

II. POSSIBLE AMENDMENTS TO SECTION 372(C)

For most of the nation's history, the only formal procedure for dealing with misconduct by federal judges was the cumbersome process of impeachment. Criminal prosecution was a theoretical possibility, but until 1980, "no sitting federal judge was ever prosecuted and convicted of a crime committed while in office." NCJDR Report at 326.

That era ended with the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (to give it its full name). The 1980 law, codified as section 372(c) of the Judicial Code, established a new set of procedures for judicial discipline and vested primary responsibility for implementing them in the federal judicial circuits. Minor changes were made in later years, notably in the Judicial Improvements Act of 1990.

In enacting section 372(c), Congress opted for a system that has aptly been described as "decentralized self-regulation." See FJC Study at 29. I see no reason to revisit that decision, but I do think that some fine-tuning is in order. The suggestions in Part II are drawn largely from the Federal Judicial Center study and from the rules adopted by the Judicial Council of the Ninth Circuit in furtherance of the Act.

A. Recognizing authority of chief judge to conduct limited inquiry

Ordinarily, the process delineated in section 372(c) begins with the filing of a complaint about a judge with the clerk of the court of appeals for the circuit. The clerk must "promptly transmit" the complaint to the chief judge of the circuit. The chief judge, after "expeditiously reviewing" the complaint, has three options. He can dismiss the complaint; he can "conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events;" or he can appoint a special committee to investigate the allegations.

The Act says nothing about the procedures the chief judge may or must follow before determining which of these steps to take. However, for at least a decade, the Illustrative Rules have recognized the power of the chief judge to conduct a limited inquiry as part of the process of "expeditious review." The rules adopted by the various circuits also embody this authority. For example, the Ninth Circuit's Rule 4(b) provides:

> In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response will not be made available to the complainant unless authorized by the responding judge. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents.

I agree with the Judicial Conference, the circuits, and the National Commission that authority to conduct a limited inquiry is implicit in the existing statute. For example, as already noted, the statute provides that the chief judge "may conclude the proceeding if he finds that appropriate corrective action has been taken." It is hard to see how the chief judge could make such a finding without undertaking at least some investigation into the facts of the complaint.

Nevertheless, I believe it would be desirable to amend the Act to recognize the power explicitly. By hypothesis, the Act deals with matters of great sensitivity. Something as important as the power of the chief judge to conduct a limited factual inquiry should not be left to implication from other statutory language.

A second reason for amending the Act is that Congress can also make explicit the limitations on the power. For example, the amendment could make clear that the power to conduct a limited inquiry does not include the power to resolve issues of credibility. If the validity of a complaint depends on whether one believes an allegation that is not inherently incredible or refuted by objective evidence, the chief judge should appoint the special committee required by the statute.

B. Recognizing authority of chief judge to dismiss after limited inquiry

Under § 372(c) as it now stands, the chief judge may dismiss a complaint for any of three reasons:

(i) [The complaint is] *not in conformity* with paragraph (1) of this subsection. [Paragraph (1) provides: "Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct."]

(ii) [The complaint is] *directly related to the merits* of a decision or procedural ruling, or

(iii) [The complaint is] *frivolous*. (Emphasis added.)

Experience suggests that a fourth category should be added, and that the third category should be delineated more fully.

The proposed fourth category would carry forward the suggestion (discussed above) that the chief judge be explicitly authorized to conduct a limited inquiry. If the limited inquiry demonstrates that the allegations lack any factual foundation or are conclusively refuted by objective evidence, the chief judge should be authorized to dismiss the complaint.

This suggestion draws upon both the Illustrative Rules and the Federal Judicial Center study. The FJC study recommended that the chief judge be authorized to dismiss the complaint if the limited inquiry demonstrates "that the allegations lack any factual foundation." FJC Study at 63. However, I think the statute should be more explicit in addressing what may be a common situation: objective evidence uncovered by the inquiry conclusively refutes the allegations of the complaint. For example, the complaint may assert that the judge used an ethnic slur or other offensive language. An audio tape of the proceeding may demonstrate beyond question that the judge did not use the language attributed to him.

This proposal, like the first one, would largely codify present practice. For example, the Ninth Circuit's rules provide that the term "frivolous" includes "alleging facts that are *shown by a limited inquiry* [to be] plainly untrue [or] lacking sufficient evidentiary support either (i) to raise an inference that some kind of cognizable misconduct has occurred, or (ii) to warrant further investigation." (Emphasis added.)

I do not take issue with this interpretation of section 372(c). It is not unreasonable to say that an allegation that is "plainly untrue" or that "lack[s] sufficient evidentiary support" falls within the realm of the "frivolous." Nevertheless, there are at least three reasons why it is desirable to amend the statute to establish a separate category for dismissals based on limited inquiry.

First, the Ninth Circuit's rules, like those of other circuits, may stretch the term "frivolous" somewhat beyond its generally accepted meaning. As the FJC study pointed out, "complainants may more commonly understand the term—to refer to complaints that contain insufficient factual allegations to warrant inquiry. A dismissal for frivolousness, therefore, could readily be misunderstood as an indication that the chief judge did not take the complaint's allegations seriously." FJC Study at 63.

Second, as also noted by the FJC study, a misunderstanding of that kind would be particularly unfortunate when a complaint alleges ethnic, gender, or some other kind of bias. "A dismissal as 'frivolous' might leave the unseemly impression that allegations of that kind do not concern the judiciary." *Id.*

Third—and generalizing from the preceding point—I think it is desirable to distinguish between dismissals based on the complaint alone and those based on evidence outside the complaint. This point is further developed in Section C, immediately below.

C. Specifying other bases for dismissal identifiable on the face of the complaint

In addition to the language quoted above, the current Ninth Circuit rules define "frivolous" to include "making charges that are wholly unsupported or alleging facts that are shown by a limited inquiry [to be] (A) plainly untrue, (B) incapable of being established through investigation, or (C) lacking sufficient evidentiary support either (i) to raise an inference that some kind of cognizable misconduct has occurred, or (ii) to warrant further investigation." 9th Cir. R. 4(c)(3).

While I respect the Ninth Circuit's efforts to be comprehensive and meticulous in giving content to the term "frivolous," I am concerned that the formulation improvidently intermingles reasons for dismissal that can be identified from the complaint alone and those that require some consideration of materials outside the complaint.

Lawyers are familiar with the distinction between a dismissal on the pleadings and the grant of summary judgment. The distinction is reflected in Rule 12(c) of the Federal Rules of Civil Procedure:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

For two reasons, recognition of the distinction is especially appropriate here. First, the complainant has a legitimate interest in knowing whether his complaint was found wanting on its face or whether the chief judge relied on other evidence in reaching his conclusion. Second, if the matter proceeds to review by the judicial council (see section D, below), the reviewing body should not have to speculate as to whether the dismissal was based on the complaint alone.

In this light, I think it is desirable to amend subsection (iii) of § 372(c)(3)(A) by specifying other reasons for dismissal that can be identified on the face of the complaint. Drawing on the Ninth Circuit's rules and commentary, I suggest that the provision might authorize the chief judge to dismiss the complaint if it "is frivolous, if it does not include sufficient evidence to raise an inference that misconduct has occurred, or if the allegations are incapable of being established through investigation."

The amendment should make clear that dismissals in these categories are distinct from dismissals after limited inquiry. By the same token, the judicial councils of the circuits, in submitting the reports required by 28 USC § 332(g), should give separate tallies for dismissals after limited inquiry and dismissals based on the complaint alone. The Director of the Administrative Office should do so as well in the summaries published annually in accordance with 28 USC § 604(h)(2). This additional information will shed important light on the operation of the system and thus will assist Congress in the performance of its oversight function.

D. Authorizing review by a committee of the judicial council

Under § 372(c)(10), a complainant who is dissatisfied with the chief judge's order dismissing the complaint or terminating the proceeding may seek review of the order by filing a petition addressed to the judicial council of the circuit. The judicial council then considers the petition under rules adopted pursuant to § 372(c)(11). That paragraph authorizes each judicial council to "prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as [the council] considers to be appropriate."

Nothing in section 372(c) explicitly authorizes the council to delegate the review function to a smaller group within the council, and it appears that in most circuits all members of the council participate in the process. However, at least one circuit reads section the statute as authorizing delegation. As reported in Rule 7 of the rules adopted by the Fifth Circuit, "By standing resolution the judicial council may delegate the review process to rotating panels drawn at random with power to act on behalf of the full council." (The rules can be found at the court's web site. See *http://www.ca5.uscourts.gov/Clerk/ClerksOffice.cfm.*)

Reasonable people can disagree as to whether the Fifth Circuit's "standing resolution" is authorized by the statute. In any event, the idea is a good one. The Federal Judicial Center study suggested that the Act "should be amended to permit petitions for review to be determined by a standing or rotating three-judge panel of the judicial council, rather than by the entire council." FJC Study at 194. I endorse this suggestion, with one modification: I would require that the review panel consist of at least three members of the council (one of whom must be a district judge), but I would not specify the number in the statute. Some councils may prefer a larger review body; they should not be denied that option.

The reason for allowing panel review is twofold. First, some of the judicial councils are quite large; for example, the Fifth Circuit's has 19 members. Requiring 19 judges to review a chief judge's order dismissing a complaint is not a good use of scarce judicial resources.

Second and more important, vesting the review function in the entire council risks diffusing responsibility. In contrast, if the task is assigned to a group of 3 or 5 judges, those judges can concentrate on the tasks and are likely to put more time and effort into the review process. (For further discussion, see FJC Report at 161–63.)

E. Reorganizing section 372(c)

In the current version of section 372(c), the provision governing dismissals by the chief judge is found in paragraph (3), while the provision authorizing review of such orders by the circuit council is found in paragraph (10). If Congress amends the Act, I suggest that the statute should be reorganized so that closely related provisions are arranged in a logical sequence.

In fact, I would go further. As noted at the outset, the provisions of the 1980 Act establishing new procedures for dealing with allegations of misconduct by federal judges were codified in section 372(c) of the Judicial Code. It seems anomalous that matters so important and wide-ranging would be incorporated into Title 28 as a single subsection of an existing section. I think these provisions warrant their own section, and indeed their own chapter, in the Judicial Code. Separate chapters have been established for "executions and judicial sales" (Chapter 127), "Moneys paid into court" (Chapter 129), and "Attachment in postal suits" (Chapter 173). Surely judicial discipline should be put on an equal footing from an organizational perspective.

This is partly a matter of practicality; a separate chapter, with separate catchlines for each section, would be easier to locate and navigate. But there is also symbolic value in placing the provisions on judicial discipline in a chapter devoted to that subject alone.

III. OTHER ISSUES WARRANTING ATTENTION

The proposals in Part II (other than the suggestion for reorganizing and relocating section 372(c)) draw on existing rules and practices in the circuits as well as the Federal Judicial Center study. For that reason, I offer them with some confidence. (Of course, the particular language should be chosen with care.) Other aspects of the process also warrant scrutiny by the Subcommittee; however, the evidence now available does not point to the need for statutory revision at this time. I discuss them here because I believe it is worthwhile to put the issues on the table as the Subcommittee pursues its oversight responsibilities.

A. Inclusion of reasons for dismissing complaints

Section 372(c)(3) states that the chief judge may dismiss a complaint "by written order stating his reasons." However, the Federal Judicial Center study found that "not all chief judges' orders of dismissal have provided a statement of the allegations of the complaint and the reasons, as opposed to the conclusions, supporting its dismissal." In fact, three of the eight circuits in the study "had long-standing practices of issuing conclusory form orders to dispose of insubstantial complaints." FJC Study at 80.

Even when the authors of the study looked only at "arguably meritorious allegations," they found that the chief judges' orders were not always "responsive." (In assessing "responsiveness," the authors "looked for whether the chief judge restated [the particular] allegation and responded to it and whether the chief judge stated conclusions or specific reasons for the conclusions." FJC Study at 82.)

The authors of the study anticipated that all circuits would soon be moving to a system under which the chief judge would articulate reasons for dismissing a complaint. That was in 1993. Unfortunately, as far as I am aware, there is no published information that tells us whether this has in fact occurred. If it has, there is no need to do anything. If chief judges in one or more circuits continue to issue "conclusory form orders," that is a matter of concern. This is so for several reasons. Among them:

- When a complaint is dismissed with a conclusory form order, the complainant may lack confidence that the chief judge has actually considered the grievance. This will reinforce the sense of mistrust that often underlies the filing of a complaint against a judge.
- As pointed out by the National Commission, a non-conclusory statement "may be critical—to the understanding of those engaged in oversight or evaluation." NCJDR at 351.

If some complaints are still being disposed of with a conclusory form order, either the Judicial Conference or Congress should consider imposing a requirement that the chief judge state the reasons for a disposition adverse to the complainant.

B. Visibility of the disciplinary mechanism

One purpose of the mechanism established by the 1980 Act is, of course, to foster public confidence in the federal judiciary. To that end, the mechanism must be visible. Visibility in this context entails two overlapping elements: the availability of the process must be made known to potential complainants, and the results of the process must be made known to all who are interested in the effective operation of the judicial system. On the available evidence, there is a real question whether these goals are being realized. For example:

- A spot check indicates that the rules governing complaints under section 372(c) are available on the web sites of most of the courts of appeals, but at the district court level the record is much more hit-and-miss. This may be be-

cause complaints are filed with the clerk of the court of appeals, but I think that most people would expect to find information about filing complaints concerning a trial judge on the web site of the court on which that judge sits.

- The web site of the federal judiciary gives a brief answer to the question, "How do I file a complaint against a judge?" However, the page does not include links to anything that might help—the statute, the Illustrative Rules, a form for filing a complaint, or any other explanatory material. See *http://www.uscourts.gov/faq.html.*
- The orders and memoranda filed by the chief judges of the various circuits are available only at the clerk's office of the circuit where they were issued and at the Federal Judicial Center, to which copies are sent. Anyone wanting to study these dispositions systematically would face formidable logistical obstacles.
- The Federal Judicial Center study concluded, after an examination of published orders, that "[d]issemination of information about interpretations of the Act—seems notably absent." FJC Study at 88. That report was completed in 1993, but a follow-up search on Westlaw using the same query suggests that the picture has not changed.

It is understandable that judges do not wish to shine the spotlight on judicial misconduct or disability, even when the overwhelming majority of complaints are plainly without merit. However, to the extent that the low visibility is the result of conscious choice (rather than indifference or inadvertence), I think the policy is misguided. A telling vignette comes from the FJC Study (at 129). A chief judge reported:

> After a newspaper article accusing the judiciary of a cover-up in [a special committee matter which resulted in a private, rather than a public, reprimand], a local reporter wanted to look at 372(c) files. We were able to show him files of reasoned orders. He was very surprised. I think he went away thinking this was an honest ship.

Yet even if the picture were not so positive, visibility would still be essential to the success of the system. This is so for both instrumental and symbolic reasons. At a practical level, the courts benefit if they learn about problems at the earliest possible stage, and complaints under § 372(c) can help. But some meritorious complaints will never be filed if the existence of the process is insufficiently publicized. The courts can also benefit in another way—by learning how other courts are handling allegations of misconduct or disability.

Perceptions are also important. Today, the federal judiciary is highly respected. The spate of criminal prosecutions of federal judges that aroused alarm at the time of the National Commission report is happily behind us. But that only means that this is a time for building confidence. A visible complaint process contributes significantly to that goal. Without it, we have no way of knowing whether a paucity of meritorious complaints truly reflects a healthy system or simply a lack of awareness that a complaint procedure exists. Here are some suggestions for enhancing the visibility of the process:

- At a minimum, the web site of every federal court should include a prominent link to the rules and forms for filing a complaint under § 372(c) concerning a judge of that court.
- Chief judges and judicial councils should send more of their non-routine dispositions of § 372(c) complaints for on-line publication by Westlaw, Lexis, Findlaw, and other services.
- Consideration should be given to asking the courts to send routine dispositions to the Federal Judicial Center in electronic form, so that the dispositions (or at least a selected group) can be made available easily to other courts, to oversight committees in Congress, and to researchers.
- The Federal Judicial Center should be encouraged to conduct a follow-up study to the one completed in 1993. This study need not be as elaborate or comprehensive; what we need above all is an analysis of the dispositions already on file at the Center.

Notwithstanding what I have said about enhancing the visibility of the complaint process, one other point deserves emphasis. The formal mechanisms of section 372(c) are not the only methods for dealing with misconduct or disability in the federal judiciary. These other methods will be discussed briefly in Part IV of this statement.

C. Confidentiality in the era of the Internet

As the National Commission observed in its report, some of the most controversial issues surrounding the enactment and implementation of section 372(c) have involved concerns about confidentiality. See NCJDR Report at 349–51. In its current version, the statute requires that confidentiality be maintained in "investigations" (paragraph (14)), but it does not address issues of confidentiality in cases where no special committee is appointed. The latter, of course, encompass the vast majority of complaints.

The Illustrative Rules fill this gap in two ways. Rule 16 lays down a broad rule of confidentiality for all proceedings under the Act. Rule 17 provides that when a complaint has been finally disposed of, the supporting memoranda will be made available for public inspection at the clerk's office and copies will be sent to the Federal Judicial Center; however, in all dismissals and in most other proceedings, "the publicly available materials will not disclose the name of the judge complained about without his or her consent."

The Federal Judicial Center study found that maintenance of confidentiality was a serious problem—not because of anything the judges did, but because outsiders are not bound by rules of confidentiality. "As a practical matter," the study noted, "a complainant can call a press conference (as many have), disclose the contents of the complaint, and discuss the allegations and the process." The study quoted one chief judge: "If there's a serious allegation, the reality is that confidentiality is unlikely." FJC Study at 178–79.

The development of the Internet has substantially exacerbated the problem of maintaining confidentiality. This is so not only when allegations are "serious," but also when they are plainly appropriate for dismissal. Today it is not necessary to "call a press conference;" a complainant—or anyone else—can place documents on a web site, and they will be instantly available to anyone in the world.

To get a sense of what is available, I did a search on Google. I found less material than I expected—a few complaints and a few orders. One document purported to be an order of dismissal that identified the judge who was the subject of the complaint. The version of the order on file at the Federal Judicial Center does not identify the judge.

On the basis of current information, it does not appear that disclosure of section 372(c) material presents a problem that requires immediate attention. Others at this hearing may have different experiences that suggest a greater urgency. Of course the possible remedies are substantially limited by the First Amendment's protection of rights of expression.

D. Sharing of the initial review responsibility

One chief judge suggested to the authors of the FJC study that the Act be amended to authorize chief judges to delegate review of complaints to another judge. FJC Study at 186. The judge explained:

> The chief judge's job is very time consuming; anything that can be delegated should be. There's no reason the chief judge must be involved in every one of these complaints. The chief judge should be able to decide whether a complaint must be looked at more carefully. The chief judge should hang on to anything that's close or controversial, but most are not; the chief judge could delegate those.

As long as the volume of complaints remains at its current modest levels, it is hard to justify authorizing the chief judge to delegate part of the review function. Nevertheless, I think the idea is worth keeping on the table—though not necessarily for the reasons quoted above.

First, a central feature of the system of decentralized self-regulation established by the Act is the opportunity for the chief judge to facilitate action that leads to the correction of errant behavior. To be effective, this process may require interpersonal skills that will not always be a chief judge's strong point. (I hasten to add that this comment is not based on the performance of any of the chief judges whose work I have observed.) If another court of appeals judge—perhaps a highly respected senior judge—is willing and able to take on part of the responsibility, there is much to be said for allowing the delegation.

Second, if the judiciary takes vigorous steps to increase the visibility of the § 372(c) process, this may result in a substantial increase in the number of complaints filed. Under those circumstances, it would be useful if the chief judge, especially in a large circuit, could delegate part of the review work to another judge.

If Congress were to pursue this suggestion, it might be desirable to include a requirement that any delegation be approved by the judicial council of the circuit.

IV. THE SYSTEM TODAY

Each year, the Director of the Administrative Office of United States Courts publishes a report that tabulates the number of judicial complaints filed and concluded during the preceding year. Table I (attached) presents the data for the last six years. Three things stand out.

First, the number of complaints filed against judges peaked in 1998, with an astonishing 52% increase over 1997. After that, the number has gone down in each successive year. The Director of the Administrative Office has attributed the jump in 1998 to "the use of relatively new Internet and fax-on-demand services, which made information on procedures for filing complaints more widely accessible." 1999 Annual Report at 40. (One wonders, then, why the number dropped so substantially in succeeding years.)

Second, the overwhelming majority of complaints are dismissed, either by the chief judge or by the judicial council upon review of the chief judge's order. In 1999, for example, of the 831 complaints that were concluded, only 15 were not dismissed—less than 2%. This includes 2 complaints that were "withdrawn;" we do not know what the circumstances of withdrawal were.

Third, the pace of activity has picked up in the last three years. Ten complaints were considered by circuit investigative committees, compared with a total of 3 in the preceding three years. But the numbers are too small, and the information too sparse, to enable us to say that a distinctly different pattern has emerged. Certainly the proportion of complaints that are not dismissed remains very low.

A natural reaction to these figures would be: surely federal judges—good as they generally are—cannot be that good. Either some would-be complainants are not taking advantage of the procedures of section 372(c), or the chief judges and judicial councils are sometimes failing in their duty to act when judges fall short of the standards we expect of them.

Neither possibility can be ruled out. Moreover, the small number of non-frivolous complaints carries less weight than it would if the courts had been more energetic in publicizing the existence of the complaint process. But there are also more benign explanations that may account for the low numbers.

First, the figures do not reflect the informal corrective processes that may take place in the absence of a formal complaint. One of the most important findings of the Federal Judicial Center study is that informal processes often operate very effectively to deal with matters that fall within the potential reach of section 372(c). The study quotes comments by two former chief judges that capture the experience in most of the circuits that the authors visited:

> *"In my experience, the most serious complaints never hit the complaint process."*
> *"There are more remedial actions taking place outside the complaint process than following formal complaints."*

The full description in the study (at 131–44) provides valuable insights into the operation of informal processes.

Second, many instances of judicial misconduct are dealt with through appellate review of particular cases. A good example is the opinion of the District of Columbia Circuit excoriating Judge Thomas Jackson for his out-of-court comments on the pending Microsoft case. See *United States v. Microsoft Corp.*, 253 F.3d 34, 107–117 (D.C. Cir. 2001), *http://ecfp.cadc.uscourts.gov/MS-Docs/1720/0.pdf.* Not only was the public reprimand as harsh as any that might be meted out by the Judicial Council under section 372(c), but after the widespread publicity that the opinion received, we can be confident that no federal judge will engage in similar behavior for a very long time to come. If we agree with the Illustrative Rules that the thrust of the 1980 Act is "essentially forward-looking," with the emphasis on "correcting conditions that interfere with the proper administration of justice in the courts," we can say that the system has worked, albeit not through section 372(c).

Finally, the most efficient method of maintaining integrity in the federal judiciary lies in rigorous scrutiny in the appointment process. Nominees today receive that kind of scrutiny, including "full-field" investigations by the FBI. I believe that this process helps to explain why there are so few non-frivolous complaints against federal judges.

I do not suggest that these considerations diminish the importance of section 372(c). On the contrary, section 372(c) will continue to play an essential role in dealing with misconduct or disability on the part of federal judges. In particular, informal processes could not operate as efficaciously as they do if the possibility of formal proceedings did not loom in the background. As the Federal Judicial Center study puts it (at 136–37), the chief judge "bargain[s] in the shadow of the Act."

Today's oversight hearing is a valuable step in making the section 372(c) process more effective. The amendments to the statute suggested in Part II can effect modest improvements in the system. But the greatest need is to enhance the visibility of the complaint procedure. I hope the judiciary will pursue the suggestions in Part III. If no progress is made, Congress may have to step in.

V. ISSUES RELATING TO JUDICIAL DISQUALIFICATION

Disqualification or recusal of judges (the two terms are used interchangeably) is covered by sections 144 and 455 of the Judicial Code. Section 455 was completely rewritten in 1974. The statute requires a federal judge to disqualify himself in five specified circumstances, set forth in 28 USC § 455(b), and also "in any proceeding in which his impartiality might reasonably be questioned." In this part of my statement I discuss two issues relating to the disqualification of judges.

A. Timely disclosure of judges' conflicts of interest

From time to time, a newspaper or advocacy group will publish an investigative report revealing that one or more judges have participated in cases notwithstanding a conflict of interest that mandated disqualification under 28 USC § 455(b). Perhaps the best known example is the study conducted by the Kansas City Star in 1998. The newspaper reported that federal judges in Kansas City and elsewhere "repeatedly have presided over lawsuits against companies in which they own stock." More recently, the Community Rights Counsel (CRC) publicized a research report indicating "that in 1997 at least eight federal appellate judges—ruled on the merits in at least 17 federal appeals in which they had a disqualifying conflict of interest."

The judges attributed their participation in the conflict cases to innocent mistakes or memory lapses. And the Star "found no evidence that any judge benefited personally or let his stock holdings influence his rulings." (The CRC offered no comparable disclaimer.) Nevertheless, episodes of this kind are harmful to the judiciary. At best, the judges—and perhaps the winning lawyers—suffer embarrassment. At worst, a cloud is cast over the judges' integrity.

This is another area where technology can be helpful. The Star emphasized that to determine whether a judge has a conflict of interest, the lawyer or litigant had to request copies of disclosure statements that were available only from the Administrative Office in Washington, D.C. Although the Judicial Conference of the United States has now authorized release of the disclosure reports to groups that want to post them on the Internet, it appears that the posting has not yet occurred.

The Northern and Southern Districts of Iowa (and perhaps other federal courts) have found a better way. Here is how it works.

- The web sites of those districts post "conflict lists" for the judges who sit on those courts. See, e.g., *http://www.iand.uscourts.gov/*. Each list is preceded by this statement: "Pursuant to this court's policy of disclosing relationships that pose potential or actual conflicts of interest, financial or otherwise, Judge [X] will not be handling cases involving . . ." The list that follows may include names of corporations, individuals, and law firms.
- Court rules require attorneys in civil cases to "review the list and immediately notify the Clerk of Court if it appears the presiding judge may have a conflict with any association, firm, partnership, corporation, or other artificial entity either related to any party or having a pecuniary interest in the case."
- The Northern District of Iowa goes one step further than the Southern. At the bottom of each list is the following notation: "Persons having knowledge that a case has been assigned to Judge [X] involving an entity or individual described above, or one related thereto, should immediately notify the Clerk of Court in writing of the potential conflict."

On the available evidence, the Iowa system is a forward-looking use of Internet technology that should be a model for all federal courts. There are at least four benefits from this system.

1. By allowing—and indeed requiring—the parties to take part in the conflict-identification process, the Iowa courts substantially increase the likelihood that conflicts will be discovered early in a lawsuit. Court personnel still conduct their own check, but two pairs of eyes are better than one. And of course the parties and their lawyers have a special incentive to make sure that their case is not heard by a judge who has a conflict.

2. By placing the list on the court's web site, the court makes it easy for interested observers, including advocacy groups like the CRC, to monitor judges' compliance with conflict of interest rules.
3. Unlike the financial disclosure forms, which are filed once a year and often are out of date by the time they are made public, the web site listing can be updated whenever changes in a judge's portfolio or other events require it. Courts can easily establish procedures for judges to inform their clerks' offices of such developments.
4. The Iowa system bypasses the concerns about judges' safety that initially led the Judicial Conference to resist sharing of the disclosure forms. The web site list provides only the necessary information: Judge X is recused in cases involving Corporation Y. This could be because the judge owns stock in the corporation, because he represented the corporation before going on the bench, or for some other reason.

Admittedly, the system is not perfect. The most serious problem is that judges do not always notify the Clerk of Court of new conflicts, so the list is not necessarily accurate and up-to-date. Nevertheless, the Iowa system is a tremendous improvement over the practice elsewhere.

In March 1999, the Judicial Conference of the United States rejected a proposal to "encourag[e] all courts to maintain in the clerk's office a recusal list for each judge that would be available to litigants upon written request." According to the Washington Post (Sept. 13, 1999), the judges cited "security and privacy concerns." However, that position appears to have been superseded by the vote one year later to allow release of financial disclosure forms for posting on the Internet. In this light, I suggest the following steps:

- All federal courts should adopt the Iowa system and post on their web sites conflict lists for all judges of that court.
- Each court should adopt, implement, and monitor procedures for assuring that judges inform the Clerk of Court, on a regular basis, of changes in stock holdings or other circumstances that will require changes in the conflict lists.
- Judges should be encouraged to establish arrangements with their brokers to receive notification of relevant portfolio changes in a form that can be forwarded immediately to the Clerk of Court. E-mail would seem like a good tool for this purpose.

Technology holds out other possibilities as well. Lawyers are familiar with "conflict checking" software that is used to avoid conflicts of interest when a law firm is considering taking on a new client. Similar software could check judges' conflict lists against the "statements of interest" filed by litigants in civil suits. But even if such software is developed, the Iowa system would still be a desirable backstop, if only because it enables outside groups to monitor compliance with disqualification rules.

B. Effect of judicial disqualification in en banc voting

Today's oversight hearing on judicial discipline and disqualification offers an appropriate opportunity to call the Subcommittee's attention to a minor statutory malfunction that otherwise is likely to remain uncorrected. The issue involves the effect of recusals by court of appeals judges when the court votes on whether to hear a case en banc.

28 USC § 46(c) provides that en banc hearing can be ordered "by a majority of the circuit judges of the circuit who are in regular active service." The circuits are divided on whether "majority" means (a) a majority of all active judges or (b) a majority of the active judges who are not recused. For convenience, I will refer to rule "a" as the "absolute majority rule." Five circuits—the Fourth, Fifth, Sixth, Eleventh, and District of Columbia—now follow that rule. See Judith A. McKenna, Laural A. Hooper & Mary Clark, *Case Management Procedures in the Federal Courts of Appeals* 23 (Federal Judicial Center 2000).

In circuits that require an absolute majority, en banc rehearing can be denied even though a majority of the judges who would participate in rehearing vote in favor of it. This means that recused judges are having an influence on case outcomes that by definition they should not have.

The potential consequences of the rule can be seen by considering a case that was scheduled for rehearing en banc in November in the Third Circuit. In *In re Cendant Corp. Litigation,* 264 F.3d 301 (3d Cir. 2001), the panel ruled 2–1 that the district court properly enjoined an arbitration proceeding. The majority consisted of 2 active judges. Four of the circuit's 12 active judges were recused. Under the absolute ma-

jority rule, en banc rehearing would have been foreclosed even if all 6 of the non-recused active non-panel members had voted for en banc.

The absolute majority rule means that recused judges are, in effect, paired with non-recused judges who vote in favor of en banc rehearing. Each judge who is recused cancels out the affirmative vote of a judge who is not recused.

The arguments against the absolute majority rule are set forth in detail in a lucid opinion by Judge Edward Carnes of the Eleventh Circuit in *Gulf Power Co. v. Fed. Communications Comm'n (No. 98–6222)*, 226 F.3d 1220 (11th Cir. 2000) (opinion on denial of rehearing en banc). I commend Judge Carnes's analysis to you.

Some years ago, a certiorari petition asked the Supreme Court to resolve the intercircuit conflict on the interpretation of 28 USC § 46(c). The Court denied review. See *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). (At that time the Fourth Circuit did not follow the absolute majority rule.) As far as I know, the Appellate Rules Committee of the Judicial Conference has not taken up the issue.

The problem arises because of disagreement over the interpretation of an Act of Congress. It is therefore appropriate that Congress resolve the matter. A simple solution would be to add at the end of the first sentence of § 46(c) the words "and who are not disqualified," so that the statute would provide that en banc hearing can be ordered "by a majority of the circuit judges of the circuit who are in regular active service and who are not disqualified." Another approach would be to add a new sentence or subsection defining "majority" for purposes of the rule.

(The Third Circuit, although rejecting the absolute majority rule, does require that "the judges who are not disqualified constitute a majority of the judges who are in regular active service." Internal Operating Procedures 9.5.3. I would not include that limitation.)

VI. CONCLUSION: THE COURTS AND THE INTERNET

Assuring the integrity of the federal judiciary while respecting the imperative of judicial independence will always be a challenging task. We are fortunate to live in an era when advancing technologies offer new ways of meeting the challenge.

Today, advancing technology is represented by the Internet. The Internet is a uniquely powerful and effective tool for communication. It is a tool that did not exist when Congress last revised the statute on judicial misconduct, much less when Congress rewrote the provisions dealing with judges' conflict of interest.

The current statutes represent a careful and balanced approach—although, as outlined above, some fine-tuning is in order. But optimum operation of the systems has been hampered because people often do not have the information they need. That is where the Internet comes in.

The federal judiciary has shown itself to be innovative and service-oriented in its use of the Internet in adjudication and case management. Appellate opinions can be found on line on the day they are filed. Dockets can be searched through PACER. Most intriguingly, some courts have initiated electronic filing systems "permitting attorneys in selected civil cases to file documents with the Court and deliver them to opposing parties directly from their computers using the Internet." See, e.g., *https://ecf.cand.uscourts.gov/*.

The same spirit can be applied to the matters that are the subject of this oversight hearing. As explained in Part III, courts can use the Internet to enhance the visibility of the procedure for filing complaints against judges. This will make the process more credible as well as more effective. As discussed in Part V, courts can use the Internet to help judges avoid inadvertent violations of the conflict of interest rules.

These suggestions are only a beginning. Other innovative uses of the Internet—and of technologies not yet invented—will permit the courts to further strengthen the mechanisms for preserving judicial integrity without impinging on judicial independence.

Table 1

Judicial Complaints Filed, Concluded, and Pending[1]
Fiscal Years 1995 through 2000

	1995*	1996*	1997*	1998*	1999*	2000
Filed	567	529	680	1,035	782	696
Concluded	557	610	489	1,011	831	715
By Chief Judges	401	361	274	750	410	359
Dismissed	387	351	266	742	397	343
Corrective Action Taken	12	3	2	3	11	13
Withdrawn	2	7	6	5	2	3
By Judicial Councils	156	249	215	261	421	356
After Review of Chief Judge's Dismissal[2]						
Dismissed	155	248	213	257	417	354
Withdrawn	---	---	---	---	---	---
Action Taken	1	---	---	---	---	---
Referred to Judicial Conference	---	---	---	---	---	---
After Report by Investigative Committee						
Dismissed	---	1	1	2	2	---
Withdrawn	---	---	---	---	2	---
Action Taken	---	---	1	2	---	2
Referred to Judicial Conference	---	---	---	---	---	---
Pending	188	[107]	202	230	181	162

Summary

	1995	1996	1997	1998*	1999*	2000
Total Concluded	557	610	489	1,011	831	715
Total Not Dismissed	15	10	9	10	15	18
Percent Not Dismissed	.026	.016	.018	.009	.018	.025

[1]Source: Annual Reports (1997-2000) of the Director of the Administrative Office of U.S. Courts.
[2]Petition for review of a chief judge's dismissal of a complaint.
*Revised.

EXECUTIVE SUMMARY
FEDERAL JUDICIAL MISCONDUCT

In the Judicial Conduct and Disability Act of 1980, Congress sought to provide a mechanism for identifying and correcting judicial misconduct, without intruding on judicial independence. The Act struck an appropriate balance by establishing a system of decentralized self-regulation. The basic framework of the Act is sound, but even the best of systems may require modification to meet changes in conditions or perceptions over a period of time. In particular, the emergence of the Internet as a ubiquitous vehicle for communication calls for rethinking of procedures established in the pre-Internet era.

Proposed amendments. Experience suggests several modest modifications to the statutory scheme. The statute should be amended to explicitly recognize the author-

ity of the chief judge (a) to conduct a limited inquiry into the validity of the complaint and (b) to dismiss the complaint if the limited inquiry demonstrates that the allegations lack any factual foundation or are conclusively refuted by objective evidence. Section 372(c)(3)A) should more fully specify other bases for dismissal that can be identified on the face of the complaint. The Act should be amended to permit petitions for review to be considered by a standing or rotating panel of the judicial council, rather than by the entire council.

Visibility of the process. A major purpose of the mechanism established by the 1980 Act is to foster public confidence in the federal judiciary. To that end, the mechanism must be visible. Visibility in this context entails two overlapping elements: the availability of the process must be made known to potential complainants, and the *results* of the process must be made known to all who are interested in the effective operation of the judicial system. On the available evidence, there is a real question whether these goals are being realized.

At a minimum, the web site of every federal court should include a prominent link to the rules and forms for filing a complaint under § 372(c) concerning a judge of that court. Beyond this, in the age of the Internet, more can and should be done to disseminate information about the disposition of complaints by chief judges, councils, and special committees. The Federal Judicial Center should be encouraged to conduct a study of the dispositions already on file there.

Assessing the record. The number of complaints filed against judges peaked in 1998; after that, the number has gone down in each successive year. The overwhelming majority of complaints are dismissed, either by the chief judge or by the judicial council upon review of the chief judge's order. The paucity of meritorious complaints may reflect the availability of alternate mechanisms for correcting judicial misconduct, notably appellate review and informal processes. But the record is less reassuring than it would be if the courts had been more energetic in publicizing the existence of the complaint process.

JUDICIAL DISQUALIFICATION

Conflicts of interest. From time to time, a newspaper or advocacy group will publish an investigative report revealing that one or more judges have participated in cases notwithstanding a conflict of interest that mandated disqualification under 28 USC § 455(b). To minimize such situations, all federal courts should adopt the system now used in the Northern and Southern Districts of Iowa: posting on their web sites conflict lists for all judges of that court.

Recusals and en banc voting. 28 USC § 46(c) provides that en banc hearing can be ordered "by a majority of the circuit judges of the circuit who are in regular active service." Some circuits interpret "majority" to mean a majority of all active judges, including judges who are recused. This means that recused judges are having an influence on case outcomes that by definition they should not have. The statute should be amended to make clear that recused judges are not counted.

Mr. COBLE. We are pleased to have been joined by the distinguished gentleman from east Tennessee, Mr. Jenkins.

Good to have you here, Bill.

Mr. Remington, the pressure is on you. Both witnesses came within the 5-minute cycle. So heavy hangs the ax over your head.

STATEMENT OF MICHAEL J. REMINGTON, PARTNER, DRINKER BIDDLE & REATH L.L.P.

Mr. REMINGTON. I hope to meet your expectations, Mr. Chairman. Thank you very much for the opportunity to testify.

I would also like to thank you and Mr. Berman for your very kind introductions. It is true that I spent 13 years working for this Subcommittee, and it is the best Subcommittee on the Judiciary Committee; I am biased in that regard. I would like to commend you and the Ranking Member, Mr. Berman, for your sterling leadership of this Subcommittee.

I recently spoke with former Chairman Bob Kastenmeier about this hearing, and he sends his best greetings and he underlined the importance of this particular subject before you. This hearing would also please the former Ranking Minority Member of the Full

Committee, Hamilton Fish, who served on the Commission, and just before his untimely passing in 1996, called me to his house and asked me for a status update of the Commission's recommendations.

I will make four points. First, outsiders sometimes forget, as you stated, Mr. Chairman, that House rules require each standing Committee to examine on a continuing basis the effectiveness of laws and programs within the Committee's jurisdiction. Oversight is crucial to good government. Oversight actually improves interbranch communications and relations. Sometimes judges and executive officials forget about this fact.

Upon enactment of the 1980 act, this Subcommittee was specifically requested on the House floor by Caldwell Butler, former Republican Member, to exercise oversight over judicial discipline. The National Commission underlined the importance of this oversight responsibility.

Second, article III provides that Federal judges shall hold their offices during good behavior and shall receive compensation which shall not be diminished while in office. These words, alongside the impeachment clauses, represent the entire constitutional structure for addressing issues of judicial misconduct.

Until 1980, the law of judicial discipline was essentially the law of impeachment. The 1980 act, the product of this Subcommittee, recognized that judicial independence and public accountability could exist mutually, side by side. The act satisfied constitutional parameters by asking the judiciary to self-regulate and thereby reserving removal authority to the House and Senate. The act established a mechanism within the judicial branch to consider and respond to complaints against judges.

Most complaints, virtually all complaints, are handled initially by the chief judges of the circuits and then by the circuit counsel; while impeachable offenses, if they are identified, are forwarded to this Committee through the Judicial Conference. I agree with Professor Hellman that the 1980 act is working reasonably well.

Third, in 1990, Congress created the National Commission and asked it to study problems related to judicial misconduct and to report to Congress, the Chief Justice and the President.

In 1993, the Commission issued its final report fulfilling its statutory mandate. None of the Commission's recommendations contemplated any constitutional amendments and none have been adopted or ratified in the interim. The Commission nonetheless identified a good number of statutory rule and administrative reforms that should occur within and between the three branches; and I have given you a copy of those recommendations with a status update.

In 1997, I was pleased to see that the ABA Commission on Separation of Powers noted that Congress had not been sufficiently apprised of the National Commission's report and that hearings such as this one, Mr. Chairman, should be held to consider appropriate responses. As I said, my written statement gives you a status update. I would be grateful if staff and the Committee Members would take a look at the recommendations that have not yet been implemented.

Fourth, some final thoughts: Informal action has been and remains the judiciary's most common response to episodes of judicial misconduct. Professor Hellman made that point. I agree with it. The Federal Judicial Center, a jewel in the judiciary's crown, will soon be releasing a monograph on Federal case law, interpreting the judicial disqualification statutes. This monograph should be very helpful to the Subcommittee.

The Ethics in Government Act requires all judges to file personal financial reports containing a full statement of assets, income and liabilities, as well as those of spouses and dependent children. With consideration for security concerns, these reports should be readily available to the public.

There is no compelling need to create an administrative mechanism within the judicial branch to review judicial education and training programs attended by Federal judges. A statutory cure is worse than the disease. We trust judges with the Republic; we can trust them with judicial education. However, judges must routinely consider the propriety of attending all-expense-paid seminars; and the overall value of any gift must be reported.

In conclusion, I agree with Mr. Berman's statement that our law must ensure complete impartiality. In today's climate, ask yourselves whether you want a strong and independent judiciary that maintains the highest level of ethics and conduct. I hope my testimony will assist your affirmative response to that question.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Remington. And you cause nostalgia to rear its head when you testify.

[The prepared statement of Mr. Remington follows:]

PREPARED STATEMENT OF MICHAEL J. REMINGTON

Mr. Chairman, I appreciate the opportunity to testify before the Subcommittee on the important subject of "the operations of federal judicial misconduct and recusal statutes." In a time of terrorism and turmoil, the functioning of our institutions of government is critically important. The federal judicial branch that has served this nation so well for so long cannot be taken for granted. An independent federal judiciary, which resolves not only constitutional questions but also statutory controversies arising from this country's criminal, antitrust, environmental and intellectual property laws, to name a few, is a strong judiciary. But it must also be an accountable and impartial judiciary that maintains the highest ethical standards.

By way of personal background, I was a counsel to this Subcommittee for nearly thirteen years, and I served as its Chief Counsel from 1983 until 1990. I previously served as a prosecutor in the U.S. Department of Justice and as Deputy Legislative Affairs Officer in the Administrative Office of the U.S. Courts. I left the committee staff in early 1991 to become Director of the National Commission on Judicial Discipline and Removal ("National Commission") where I served for 18 months.

I currently am a partner in the law firm of Drinker Biddle & Reath LLP where I co-chair the firm's intellectual property group. I am also an adjunct faculty member at two local-area law schools: Catholic University's Columbus School of Law (where I teach legislation) and George Mason University School of Law (where I teach copyright). I have no client interests in the matters before the Subcommittee this morning. This is my first formal appearance as a witness before the Subcommittee.

Permit me to make a personal observation at the outset. I routinely follow the operations and activities of the Subcommittee, and I am impressed beyond measure by your stewardship, Mr. Chairman, and that of the Ranking Minority Member, Mr. Berman, and by the leadership of the full committee under Chairman Sensenbrenner and the Ranking Minority Member, Mr. Conyers. The Subcommittee and the full Committee are in good hands.

You may be interested in knowing that my last legislative testimony on the subject before you was in Islamabad, Pakistan, before a joint session of staff and mem-

bers of the Pakistan Senate and National Assembly. On behalf of The Asia Foundation, I discussed parallel subjects of judicial and legislative independence. As we speak, these issues are of increasing importance worldwide.

Two days before his untimely passing in 1996, I was fortunate enough to be with Hamilton Fish, the former ranking member of this Committee and member (while a Member of Congress) of the National Commission. Mr. Fish was a key and conscientious contributor, along with the former chairman of the Subcommittee, Robert W. Kastenmeier, who served as chair of the National Commission after his retirement. Among other items on his mind, Mr. Fish wanted an update on implementation of the National Commission's recommendations. This hearing would please Mr. Fish. I recently spoke with Bob Kastenmeier who not only sends his best greetings to the Subcommittee but underlines the importance of the subject being scrutinized.

I. BACKGROUND

Not long ago, in June of 1986, this Subcommittee was referred Chairman Sensenbrenner's impeachment resolution, and was obliged to drop all other legislative business in order to hold a hearing into the conduct of Judge Harry E. Claiborne (a judge of the United States District Court of Nevada who had been convicted of two felonies and was incarcerated at the time) and to draft articles of impeachment. Almost four months later, on October 9, 1986, the United States Senate removed Judge Claiborne from office.

This Subcommittee crafted—with the cooperation of the federal judiciary and then Chief Justice Warren E. Burger—the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act" or "1980 Act").[1] The Act was the product of extensive dialogue between the legislative and judicial branches of government. Congress made its concern evident to the judiciary that there be in place a formal and credible supplement to the impeachment process for resolving complaints of misconduct or disability brought against federal judges, while the judiciary revealed to Congress its concern that any such system not prove to be a cure worse than the disease.

In 1986, Senate Majority Leader Robert Dole, in the wake of the Claiborne impeachment and removal proceedings, proposed the statutory establishment of a study group to examine the scope of the problem of judicial discipline and impeachment. A similar proposal was introduced in early 1990 by Chairman Kastenmeier and Ranking Member Carlos Moorhead. The measure passed both the House and Senate in late October, and was signed by President George Bush on December 1, 1990. By that time, two other federal judges had been impeached (and removed from office) and two others prosecuted for violation of the federal criminal laws.

In my testimony, I will cover four issues: first, the need for affirmative and continuing oversight of judicial discipline statutes and methods; second, a brief assessment of the 1980 Act; third, a review of the recommendations of the National Commission, with a status update; and, fourth, a brief analysis of other judicial discipline methods and laws.

II. OVERSIGHT

As you know, the Rules of the House of Representatives require each standing committee to ". . . review and study on a continuing basis, the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction. . . ." Rule X, clause 2, 107th Congress. In addition, each committee is further required continually, not just periodically, to review and study the operation of federal entities which have authority over laws within the Committee's jurisdiction, any conditions or circumstances that may indicate the desirability of enacting new or additional legislation, and to undertake future research and forecasting on matters within the Committee's jurisdiction.

The importance of oversight is uncontestable because it assists the Congress in understanding how particular laws are being implemented and how government programs are being administered. Effective oversight is also very useful for government officials responsible for administering programs because it gives them an opportunity to explain and justify their decisions and priorities. It also gives them the chance to hear the views, including criticism, of Members of Congress who control their budgets and can rewrite legislation. Oversight involves two-way communications designed to identify any subjects that could become serious problems, and then attempts to resolve differences. Because it instills appreciation of each other's processes and problems, oversight improves inter-branch relations.

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[1] Public Law 101–650, 104 Stat. 5124, *codified* at 28 U.S.C. §§ 332, 372.

As compared to other standing committees, the Judiciary Committee does not have a subcommittee with overall oversight responsibility. Rather, oversight is often exercised by the specific subcommittees. Historically, this Subcommittee has been very diligent in exercising its oversight responsibilities, including over the federal judicial branch of government. And the judicial branch generally is receptive to that oversight. A representative of the Judicial Conference specifically referenced this Subcommittee, stating that the Conference "has thoroughly cooperated in that oversight—and in fact has repeatedly sought and is now seeking more of it."[2] Upon enactment of the 1980 Act, this Subcommittee was specifically requested to exercise oversight of judicial discipline. For example, Representative Caldwell Butler stated: "I would like to impress on my colleagues the importance of conducting congressional oversight in this most sensitive area." On behalf of the Subcommittee, Chairman Kastenmeier promised "vigorous" oversight. He kept his promise. Periodic oversight was instrumental in reform by the judicial branch of rules promulgated to govern proceedings under the 1980 Act (the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability), and led to statutory amendments to the Act in 1988 and 1990. This oversight hearing is part of that continuum.

Not without controversy and debate, the National Commission specifically considered the issue of oversight of judicial discipline and confirmed that the "House Committee on the Judiciary, within its jurisdiction, [should] exercise periodic oversight of judicial discipline, judicial ethics, and criminal prosecutions of federal judges." In the view of the Commission, congressional oversight will help the judicial branch enforce judicial ethics (including judicial disqualification and recusal) and administer the 1980 Act so as to prevent conditions that could lead to discipline and impeachment. In this regard, oversight will promote judicial accountability. It will also help the legislative branch to understand how well the judiciary is generally doing with its self-administration of judicial discipline matters. That understanding will protect judicial independence by reducing the possibility that the Congress might enact a different disciplinary scheme.[3]

A key aspect of oversight of judicial discipline is written into 28 U.S.C. § 604(h)(2), where the Director of the Administrative Office of the U.S. Courts must include in his annual report a summary of judicial discipline and disability complaints, "indicating the general nature of such complaints in which action has been taken." Without the Director's annual reports, it is very difficult to assess the functioning of the 1980 Act.[4]

Also, oversight of the U.S. Department of Justice can be very useful. In the five prosecutions of federal judges in the 1980s, there was apparently no timely communication to enable the House to have any meaningful say in the decision that criminal prosecution would precede impeachment. Congress was surprised by the prosecutions. The communication problems should change, as the Commission recommends. In addition, explicit and implicit commitments were made during impeachment trials to examine alleged prosecutorial misconduct in the criminal cases of the federal judges. Oversight can be helpful in such matters to assure the Congress that its own impeachment powers are not being manipulated improperly, and to develop a mechanism for communication between the House and the Department.

As part of its oversight, the Subcommittee should receive testimony from representatives of the judicial and executive branches. To promote its understanding of the functioning of the judicial misconduct statutes, the Subcommittee should also engage in informal meetings with high-level representatives of the other two branches.

III. THE 1980 ACT

The U.S. Constitution provides that federal judges shall "hold their Offices during good Behavior," and shall receive a Compensation "which shall not be diminished during their Continuance in Office." Art. III, δ 1. These words alongside the Impeachment Clauses represent the entire constitutional structure for addressing issues of judicial discipline, disability, removal, and compensation. The Framers

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[2] Federal Judicial Salary Control Act of 1981, Hearings Before the Subcommittee on Courts of the Senate Committee on the Judiciary, 97th Cong., 2nd Sess. 37–38 (1982) (statement of Hon. Elmo Hunter).

[3] *See* Hearing on the Report of the National Commission on Judicial Discipline and Removal Before the House Committee on the Judiciary Subcommittee on Intellectual Property and Judicial Administration, 103rd Cong., 1st Sess. at 9–10 (1993) (remarks of Robert W. Kastenmeier); *see also* Long Range Plan for the Federal Courts at 89 (Judicial Conference of the United States, January 1995).

[4] *See* Judicial Business of the United States Courts, 2000 Annual Report of the Director 35–37 (2000).

worked long and hard over the system of checks and balances within the federal government. They designed impeachment as the only check on the judicial branch of government. In Federalist No. 79, Alexander Hamilton discussed the subject of judicial accountability:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the House of Representatives, and tried by the Senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges*" (emphasis added).

Until 1980, the law of judicial discipline was largely the law of impeachment.

The 1980 Act recognized that judicial independence and public accountability are not mutually exclusive. Prior to enactment, one highly respected federal judge (the Honorable Frank M. Johnson, Jr.) noted: "judicial independence must incorporate some notion of accountability."[5] The 1980 Act satisfied constitutional parameters by asking the judiciary to self-regulate and by reserving removal authority to the House and Senate. The Act establishes procedures and a mechanism within the judicial branch to consider and respond to complaints against judges. Most complaints are handled initially by the chief judges of the circuits and then by the judicial councils of the circuits, but when impeachable offenses are identified, the councils and the Judicial Conference are empowered to refer the matter directly to Congress.

A. Circuit Councils. Section 332 of title 28, United States Code, provides that each circuit shall have a judicial council. The circuit councils are the workhorses of federal judicial administration. Historically, the councils were the handiwork of Chief Justice Charles Evans Hughes, who had the active support of the Chairman of this Committee, Representative Hatton Sumners, whose portrait adorns this room's walls. Chairman Sumners had been a manager in the lengthy impeachment trail in 1936 of Judge Halstead Ritter. Based on his experience, Chairman Sumners concluded that there had to be a better mechanism to discipline federal judges. The result was the establishment of a decentralized entity with broad administrative authority and responsibility.

As regards judicial discipline, however, the councils did not fulfill their original vision. When a case involving the authority of a circuit council to discipline a judge finally reached the U.S. Supreme Court, the Court found statutory language concerning the council's power to be ambiguous. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970). In an important footnote, Chief Justice Warren E. Burger supported the concept of statutorily granting the councils, as administrative bodies, broadened enforcement authority with clarification of procedures to review council orders. *Id.* at 85, n. 6.

That is exactly what happened in 1980 when Congress enlarged the authority of the councils to include judicial discipline and disability and established a review mechanism within the judiciary.[6] Congress opted against the establishment of an independent "judicial misconduct and tenure" commission with delegation of the removal function to the commission (which was thought to be of dubious constitutionality).[7]

B. Judicial Discipline. Section 372(c) of title 28, United States Code, sets forth a way for any person to complain about a federal judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." Subsection (c) also provides a procedure for the handling of such complaints and permits the councils to adopt rules for the consideration of complaints. The statutory scheme creates a tiered response within the judiciary for responses to complaints, with authority residing initially in the chief judge of the circuit (who can dismiss complaints and even fashion a complaint, if one has not been filed), with assignment to special committees, if necessary, to investigate complaints, then review by the circuit council and ultimately the Judicial Con-

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[5] Frank M. Johnson, Jr., "Judicial Independence Once More an Issue," 65 ABA Journal 342 (1979).

[6] For further information about aspects of the 1980 Act relating to the councils, see Remington, Michael J., Circuit Council Reform: A Boat Hook for Judges and Court Administrators, 1981 Brig.Y.L. Rev. 695.

[7] *See generally* Hearings on Judicial Independence: Discipline and Conduct Before the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, 101st Cong., 1st Sess. (1989); *see also* Kastenmeier, Robert W. & Remington, Michael J., Judicial Discipline: A Legislative Perspective, 76 Ky. L. Rev. 763 (1987–88) (reprinted in hearing record at p. 105).

ference in the most serious cases. The list of sanctions set forth in the statute includes: ordering, on a temporary basis, no further assignment of cases; censoring or reprimanding by private communication; censoring or reprimanding by public announcement; certifying a disability; requesting a voluntary retirement; and such other action as the council considers appropriate (except removal from office of a lifetime-tenured judge).

In crafting the 1980 Act, this Subcommittee took extra steps to ensure its constitutionality. The Subcommittee received extensive testimony, and requested and reviewed a study of the American Law Division of the Library of Congress on the subject. The House Committee Report had a special section on constitutionality. See H. Rep. No. 1313, 96th Cong., 2nd Sess. (1980). The Senate requested its own analysis and debated the subject at some length on the Senate floor.

Every court that has adjudicated cases challenging the Act has found that it passes constitutional muster. In 1986, the 11th Circuit found that the statute, far from being an unconstitutional encroachment on the autonomy of the federal judiciary, strengthened the independence of the judicial branch as a whole. *In re Certain Complaints Under Investigation*, 783 F. 2d 1488, 1507 (11th Cir. 1986), *cert. denied*, 106 S. Ct. 3273. Recently, the D.C. Circuit held that Article III of the Constitution does not clothe federal judges with absolute immunity from lesser sanctions (from public reprimand to taking cases away) contemplated by the 1980 Act. *See McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 2001 U.S. App. LEXIS 20843 (Sept. 21, 2001).

IV. THE NATIONAL COMMISSION

A. Background about the Commission. In 1990, Congress assigned three duties to the National Commission: (1) to investigate and study problems and issues related to the discipline and removal from office of lifetime-tenured federal judges; (2) to evaluate the advisability of proposing alternatives to current arrangements for responding to any identified problems and issues; and (3) to submit to Congress, the Chief Justice and the President a report of its findings and recommendations. The Commission was not given authority to make recommendations regarding the judicial appointments process.

In 1991, following selection and appointment of the thirteen commissioners by all appointing authorities, Bob Kastenmeier was selected Chairman. The Commission formally commenced its work in early 1992, reviewing presentations concerning historical, constitutional, and current perspectives on judicial discipline and the removal of life-tenured judges from office, and developing a general plan for identifying policy questions genuinely in need of review. The Commission arranged for consultancy studies [8] individually designed to explain existing laws, policies, perceptions, and the historical background. In addition, major contributions to the research effort were made by two entities within this Subcommittee's oversight jurisdiction, the Federal Judicial Center [9] and the State Justice Institute. Further, the Library of Congress Law Library prepared a report on the removal and discipline of judges in twenty-six countries and five international judicial organizations. Finally, a number of highly respected law firms contributed to the research efforts. A list of the studies, many of which have lasting value, is attached as Appendix I. Several were used during the impeachment proceedings of President Clinton.

The Commission also held public hearings, receiving testimony from more than thirty witnesses, including a Congressman (Rep. Don Edwards of California, who had served as a House Manager), a former Senator who had served as a Senate Trial Committee chairman in recent impeachments (Charles McC. Mathias), four additional Representatives with developed views about the House's impeachment role (Representative Applegate, Representative Field, Representative Hyde, and Representative Sangmeister), two Senators who had served on Trial Committees (Senator Rudman and Senator Levin), the Senate author of a constitutional amendment (Senator Thurmond), attorneys who had served either Congress or judges in impeachment proceedings, a Deputy Attorney General of the United States, and representatives of concerned public interest organizations. A Roundtable Discussion of

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[8] *See* Research Papers of the National Commission and Judicial Discipline & Removal (1993); *see also* Disciplining the Federal Judiciary, 142 Penn L. Rev. 1–430 (1993).

[9] Of particular usefulness was the Center's study on the "Administration of the Federal Judicial Conduct and Disability Act of 1980" by Jeffrey N. Barr and Thomas E. Willging. *See* Research Papers at 477; Jeffrey N. Barr & Thomas E. Willging, Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 Penn. L. Rev. at 25.

constitutional issues related to discipline and removal of life-tenured federal judges was conducted by four constitutional law professors and a constitutional historian.[10]

After a series of public meetings, the Commission issued a draft report and tentative recommendations which were subjected to three further days of hearings. On August 2, 1993, the National Commission issued its final report. *See* Report of the National Commission on Judicial Discipline & Removal (August 1993) ("Report").

B. The U.S. Supreme Court's decision in United States v. Nixon. While the Commission was conducting its inquiry, on January 13, 1993, in *Nixon v. United States*, 506 U.S. 224 (1993), the United States Supreme Court upheld the Senate's authority to determine the method it uses for conducting impeachment trials, concluding that the challenge to the Senate's use of a Rule XI committee by former Judge Nixon was not judicially reviewable. The decision underlined a textual commitment in the Constitution regarding assignment of "sole" impeachment authority to the House (to accuse) and the Senate (to judge). Writing for the Court, Chief Justice Rehnquist stated that "judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the judiciary by the Framers." 506 U.S. at 235. The House of Representatives should be mindful of the Nixon decision because in exercising its sole power to indict a federal judge for violation of the "good behavior" clause of the Constitution, judicial review is not possible unless a textual provision of the Constitution is violated.

C. Report and Recommendations. Permit a brief summary of what I consider to be the more significant recommendations and conclusions of the National Commission. All the recommendations and conclusions, with an implementation update, are set forth in Appendix II. Despite the fact that I am testifying in my own capacity, I have no reason to criticize any of the National Commission's recommendations. In fact, I readily embrace them.

1. *Constitutional Questions.* First, the National Commission concluded that removal from office of judges who serve on good behavior under Article III by means other than impeachment and conviction would require a constitutional amendment. None of the Commission's recommendations contemplated any constitutional revisions. The reason is that none was deemed necessary. In the final analysis, the Commission did not find that the House and Senate should be relieved of the power and responsibility to make an independent political judgment about the fitness of a federal judge to remain in office.

[Status: no constitutional amendments to federal judicial discipline arrangements have been ratified.]

Having found the discipline and removal system not broken beyond repair, requiring a constitutional restructuring, the Commission nonetheless identified a good number of statutory, rule and administrative reforms that should occur within, among and between the three branches of the federal government. However, the Commission concluded that if current arrangements become wholly inadequate and incapable of consequential improvements, radical reforms should be seriously contemplated. But having carefully considered the relevant mechanisms of the three branches, the Commission also concluded that substantial improvements are possible, and its recommendations are crafted to achieve that end.

The American Bar Association, which established a special task force to monitor and evaluate the work of the National Commission, concurred with the Commission's overall views and adopted a policy in favor of the 1980 Act. In a 1997 report on "An Independent Judiciary," the ABA Commission on Separation of Powers and Judicial Independence noted that Congress had not been sufficiently apprised of the Report of the National Commission and that hearings (such as this one) should be held to consider appropriate response to problems in the judicial discipline and removal arena.[11] This should be done before consideration of any proposals for additional legislation or constitutional amendments in the area of judicial discipline.

Mr. Chairman, it took almost two centuries of American history to create a judicial discipline mechanism; eight years after the National Commission's Report is a blink of an historical eye.

2. *The Legislative Branch.* When the situation presents itself, the House of Representatives should give serious thought to expediting the impeachment process, through acting prior to prosecution of a judge or immediately after conviction. Before the criminal trial of a federal judge, the House and the Jus-

[10] *See* Hearings of the National Commission and Judicial Discipline & Removal (1993).

[11] The Report is available on the ABA's website, *<http://www.abanet.org/govaffairs/judiciary/r6a.html>.*

tice Department should consult each other to determine together whether impeachment should precede the criminal trial. Subject to statutory and rules exceptions, the House should expeditiously obtain relevant wiretap and grand jury information relating to the possible House impeachment and Senate trial of a federal judge.

In addition to conducting oversight, the Commission recognized the key role that this Committee plays in the impeachment process and recommended that:

- The Committee acknowledge every judicial discipline complaint. The Committee should continue to keep a record of the number and nature of these complaints, and report these data in its summary of activities. In serious cases involving potentially impeachable conduct, the Committee should engage in an inquiry or solicit the assistance of the Justice Department in such an inquiry;
- The House should ensure that the Committee has the resources necessary to deal with judicial discipline matters, and the resources and institutional memory necessary to handle impeachment cases as they arise; and
- The Committee routinely receive from the Administrative Office all final orders and accompanying memoranda required by the 1980 Act to be publicly available.

[Status: although the Committee has exercised its oversight authority and has maintained the resources necessary to deal with judicial discipline and impeachment matters, it has not systematized its handling of judicial discipline complaints. It also has not routinely received publicly available information from the Administrative Office.]

Again, when circumstances present themselves, given the wide latitude that the Senate has to develop and implement impeachment trial procedures, the Senate should consider experimenting with a variety of delegation approaches (including use of masters) to simplify issues prior to any removal trial. Further, the Senate should consider the establishment of a standard of proof in impeachment trials. Moreover, the Senate should consider amending its Impeachment Rules to permit a Rule XI Committee (trial committee) to make proposed findings of fact and recommendations to the Senate on articles of impeachment involving federal judges. Finally, following conviction of a federal judge in a Senate impeachment trial, the Senate should always decide whether to disqualify the judge from future public office.

[Status: because the Senate has not faced a judicial impeachment since issuance of the Report, it has given little consideration to the Commission's recommendations.]

One recommendation was directed to the Congress. When prosecution and conviction of a federal judge occur first, the facts that were necessarily found in the criminal conviction should be used by Congress so as to make impeachment proceedings or a Senate trial more efficient.

[Status: because no judicial impeachments have taken place since issuance of the Report, this recommendation has not been implemented.]

3. *The Executive Branch.* The Commission concluded that the Department of Justice should promulgate guidelines and procedures for government litigators and U.S. Attorney's offices regarding the circumstances under and the manner in which the mechanisms of the 1980 Act are utilized. Furthermore, the Department of Justice should issue explicit guidelines and procedures for the investigation and prosecution of federal judges, and that these guidelines and procedures require the approval of the Attorney General for full-scale investigations and intrusive investigative techniques.

[Status: based on information and belief, the Department of Justice has not implemented the Commission's recommendations. In any event, the Committee should as part of its oversight inquire of the Department whether it has improved its internal procedures regarding the prosecution of sitting federal judges.]

4. *The Judicial Branch.* Numerous Commission recommendations were made to the judicial branch. The Illustrative Rules should be revised in certain regards, and then adopted by the circuit councils. Discipline under the 1980 Act should be possible for a judge's delay in decision-making but only in unusual circumstances such as habitual failure to decide matters in a timely fashion. Circuit chief judges and circuit councils should refer non-frivolous criminal allegations to prosecutors or this Committee. The ethics code for federal judges should be amended to expressly prohibit judicial misconduct reflecting or implementing bias on the basis of race, sex, sexual orientation,

religion, or ethnic or national origin, including sexual harassment; and such misbehavior should be subject to discipline under the 1980 Act unless it is "merits-related." Each judicial circuit council should appoint a committee (whose membership would include non-judges) to serve as a filter and conduit for serious complaints against federal judges. Orders dismissing complaints against judges should contain more information than they now usually contain. A body of precedents should be developed in the field of judicial discipline. The Judicial Conference and circuit councils should consider adoption of judicial evaluation programs. Finally, the Supreme Court should consider adopting policies and procedures for filing and disposing of complaints against Supreme Court Justices.

[Status: a majority of the recommendations directed at the judicial branch have been implemented administratively, but several have not including the appointment of committees before the circuit councils to screen complaints, amendments to the ethics code to prohibit various forms of discrimination or harassment, and a self-reporting rule for judges who have been indicted, arrested, or informed that they are the target of a federal or state criminal investigation.]

5. Legislative recommendations. The National Commission made only a handful of recommendations for legislative action:

- Provide that section 201 of Title 18, United States Code, be amended to make clear that it does not authorize the removal of any lifetime-tenured judicial officer. *[Status: not enacted.]*
- Enact a statute to provide that a judge who has been convicted of a felony shall not hear or decide cases unless the appropriate circuit council determines otherwise. *[Status: not enacted.]*
- Provide that, upon conviction of a felony, a federal judge should cease to accrue credit, through age of years of service, towards retirement (under the rule of 80). *[Status: Judicial Conference passed a resolution to this effect, but not enacted.]*
- Amend section 332 of Title 28, United States Code, to require each circuit council to report annually to the Administrative Office the number and nature of orders entered thereunder that relate to judicial misconduct or disability (including delay). *[Status: enacted as an amendment to 28 U.S.C. § 332(g).]*
- Amend section 372 of Title 28, United States Code, to include as an additional ground of dismissal by a chief judge that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation. *[Status: implemented administratively as an amendment to the Illustrative Rules.]*
- Amend the public disclosure requirements under federal law to require a federal judge either (1) to certify that, to the best of his or her knowledge, information and belief, the judge does not, except as permitted by Canon 2(c), hold membership in any organization that practices invidious discrimination on the basis or race, sex, religion, or national origin, or (2) to list all organizations not exempted by Canon 2(c) of which the judge is a member. *[Status: not enacted.]*

V. OTHER JUDICIAL DISCIPLINE METHODS AND LAWS

A. Informal Methods of Judicial Discipline. Section 332 permits the circuit councils, through their respective chief judges, to employ informal methods of resolving problems. This authority is traditional, not textual. Informal action "has been and remains the judiciary's most common response to episodes of judicial misconduct." See Geyh, Charles Gardner, Informal Methods of Judicial Discipline, 142 U. Penn. L. Rev. 243, 280 (1993). Professor Geyh, a former counsel to this Committee, also identifies two further devices with disciplinary implications: (1) appeal and mandamus; and (2) peer influence. Appeal and mandamus are relatively weak tools to address judicial misconduct because they are applied on a case-by-case basis and do not appear to be sanctions. Peer pressure may be effective but is largely invisible to the public eye. Nonetheless, an understanding of these informal processes is essential to a fuller understanding of judicial discipline.

B. Judicial Disqualification and Recusal. An individual's right to have a case heard before an impartial judge is protected by the Due Process Clause of the Fifth Amendment and sections 144 and 455 of title 28, United States Code. These constitutional and statutory provisions enable litigants to request that a judge recuse himself or herself on counts of bias of conflict of interest.

Section 144 authorizes a litigant to disqualify a judge by filing a timely and "sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against [the litigant] or in favor of any adverse party." In comparison, section 455 provides that a judge must "disqualify" himself or herself from any proceeding in which the judge's *impartiality* might reasonably be questioned or in any case in which the judge, or members of his or her family, are parties to the case or have a *financial interest* in a party to the case. Although the standards for a finding of bias or partiality would appear easy to meet, they are not. Recusal appears to be rare, and reversal of a refusal to recuse is even rarer. Inherent in these statutes' requirements that a judge disqualify or recuse if bias or partiality reasonably may be questioned is a fundamental principle that our justice system must satisfy an appearance of justice.

As compared to judicial discipline which is administered by the relevant circuit council and the Judicial Conference, judicial recusal is determined on a case-by-case basis by individual federal judges. An understanding of how well section 144 and section 455 are working requires an analysis of the case law. It is my understanding that the Federal Judicial Center will soon be releasing a descriptive monograph on federal case law interpreting the judicial disqualification statutes. I recommend that the Subcommittee examine this monograph very closely, and if further prescriptive research is necessary, that the Subcommittee request the Center to do so.

C. Judicial Ethics. Federal judges must satisfy exacting ethical standards regarding personal finances. The Ethics in Government Act of 1978, as amended, requires all judges to file personal financial reports containing a full statement of assets, income, and liabilities as well as those of spouses and dependent children. Pub. L. No. 95–521, 92 Stat., 1824, 1851–61. The reports are to be made available to the public. However, to the best of my knowledge, the judges' financial disclosure forms are extremely difficult to obtain. As regards judicial officers, the Act is administered by the Judicial Conference which has established a Judicial Ethics Committee to assist. In past years, this Subcommittee has conducted continuing oversight of the Judicial Ethics Committee. I am honored to appear on a panel with the Chairman of that Committee.

D. Review of Judicial Education and Training Programs. After the media reported stories after federal judges' attendance at expense-paid educational seminars whose sponsors accept funding from corporate foundations and other entities with a potential interest in the outcome of federal litigation involving topics covered by the seminar, judicial education became a hot topic. A legislative proposal was introduced in the Senate to create an administrative mechanism within the judicial branch to review judicial education and training programs attended by federal judges. *See* S. 2990 (Kerry/Feingold), 106th Cong., 2nd Sess. (2000), the Judicial Education Reform Act of 2000. Although it contains exceptions, S. 2990 essentially bans privately-funded seminars by prohibiting judges from accepting private seminars as gifts. The legislation also creates a Judicial Education Fund and delegates authority to the Board of the Federal Judicial Center to approve seminars. Information about any seminar must be posted on the Internet, and the Judicial Conference is authorized to promulgate guidelines for the Center's approval process.

In my opinion, such legislation is not sound public policy. If individuals appointed by the President and confirmed by the Senate can be entrusted with lifetime tenure and Article III authority, they certainly can be entrusted with the responsibility of choosing educational seminars and programs. "Judges are continually exposed to competing views and arguments and are trained to weigh them."[12] The proposal implicates (negatively, I believe) academic freedom and First Amendment rights. The education of judges serves the public interest. That a lecture or seminar espouses a particular viewpoint (conservative, liberal, or libertarian) should not preclude a judge from attending.

However, judges should routinely consider the propriety of attending all expense paid seminars, including any appearance of impropriety. Payment of tuition, reimbursement of expenses, and the overall value of the gift that accrues from attendance at privately-funded seminars must be timely and accurately disclosed by judges. Attendance at a seminar funded by an entity with a direct or significant interest in matters before the judge strikes me as improper. Judicial ethics rules require judges, prior to attending any privately-funded seminar, to investigate the sponsors and funding sources for the seminar. Oversight hearings like this one should shine light on judges who fail to do so. The Judicial Conference's Codes of Conduct Committee routinely entertains requests for advice from individual judges and provides guidance on a case-by-case basis. If abuses occur (e.g., a failure to re-

[12] Committee on Codes of Conduct Advisory Opinion No. 67 (August 20, 1980, revised July 10, 1998).

port or an unwillingness to take the Committee's advice), resort should be made to the chief judge of the appropriate circuit pursuant to the 1980 discipline Act.

The federal judiciary has a Federal Judicial Center that is legislatively assigned the role of providing educational programs for judges on a wide variety of subjects. Judicial education by a public institution is particularly important for newly-appointed judges in areas about which they know little. In my opinion, the Center is one of the jewels in the judiciary's crown. To reduce the lure of non-government seminars at resort locations, the Subcommittee may wish to encourage the Appropriations Committee to augment the Center's budget so that more in-house educational programs can be presented.

E. The Appointments Process. A final word should be said about the appointments process which serves as the first line of defense against the corrupt, incapable, biased or intemperate judge. By requiring presidential nomination with the advice and consent of the Senate for the confirmation of lifetime-tenured judges, the Constitution is rooted in the proposition that only the most qualified and respected members of the legal profession should be appointed as federal judges. There is really no excuse for the appointment of individuals who are likely to engage in judicial misbehavior on the bench.

VI. CONCLUSION

In conclusion, our system of judicial misconduct and disability appears to be working tolerably well. I commend the Committee for conducting an oversight hearing on the operations of federal judicial misconduct statutes. In determining which path to take based on your oversight, please remember the constitutional counterweight of judicial independence. In difficult times, the judiciary is a rock of stability. Please also remember that judicial independence must accommodate some notion of accountability. An independent judiciary is an impartial judiciary. The Hamiltonian concern for protecting the judiciary from the other two branches provides a strong argument for effective disciplinary procedures, short of impeachment, within the judicial branch. Towards this end, permit me to leave you with the following recommendations:

- *Committee Oversight.* Continue your vigorous oversight of judicial independence and accountability by hearing from representatives of the U.S. Department of Justice and high-ranking judicial officers.
- Assess why the Justice Department did not implement the National Commission's recommendations.
- Assess why the federal judicial branch did not implement various Commission recommendations, and particularly, why the Administrative Office of the U.S. Courts does not make available to the Committee all final orders and accompanying memorandum required by the 1980 Act to be publicly available, and why the judicial branch is so hesitant to make information publicly available about the 1980 Act.
- *Institutional Resources of the House Committee on the Judiciary.* Consider and acknowledge every judicial discipline complaint and keep a record of complaints; maintain the resources necessary to deal with judicial discipline and impeachment matters; and review all final orders required by the 1980 Act to be publicly available.
- *Legislative Proposal.* Draft legislation to provide that, upon conviction of a felony, a federal judicial should cease to accrue credit, through age or years of service, towards retirement, and that a judge who has been convicted of a felony not hear or decide cases unless the appropriate circuit council determines otherwise, and to implement other Commission legislative recommendations.
- *Public Accountability of Financial Disclosure Forms.* Conduct an investigation of the availability to the public of judges' financial disclosure forms, and the accuracy of those forms.
- *Judicial Recusal.* Review the impending Federal Judicial Center descriptive monograph on the functioning of the judicial disqualification and recusal statutes, and, if necessary, receive a special briefing by the Center and ask that further prescriptive research be undertaken.
- *Systematic Evaluation of the 1980 Act.* Request the federal judiciary to update a previous study that was undertaken in June 1992 to assess whether the Act was working as intended and whether sufficient information is available to the public and Congress to permit meaningful oversight.

Fast forward a couple of years as trials are being conducted against terrorists, or appeals are being heard in such cases, and ask yourself whether you want a strong,

and independent judiciary that maintains that highest level of ethics and conduct, one that is fearless and incorruptible. I hope that my institutional memory, the Report and research papers of the National Commission, and my testimony will assist your answer to this question as well as your consideration of the other important issues before you.

Mr. Chairman, I am available to answer any questions that you or Members of the Subcommittee might have.

APPENDIX I

NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL

CONSULTANTS' REPORTS

I. CONSTITUTIONAL ISSUES

Peter M. Shane, "Who May Discipline or Remove Federal Judges?"

II. LEGISLATIVE BRANCH ISSUES

Warren S. Grimes, "The Role of the United States House of Representatives in Proceedings to Impeach and Remove Federal Judges."

Michael J. Gerhardt, "The Senator's Process for Removing Federal Judges."

III. EXECUTIVE BRANCH ISSUES

Todd D. Peterson, "The Role of the Executive Branch in the Discipline and Removal of Federal Judges."

IV. JUDICIAL BRANCH ISSUES

Richard L. Marcus, "Who Should Regulate Federal Judges, and How?"

Jeffrey L. Barr & Thomas E. Willging (Federal Judicial Center), "Administration of the Federal Judicial Conduct and Disability Act of 1980."

Charles S. Geyh, "Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)."

Beth Nolan, "The Role of Judicial Ethics in the Discipline and Removal of Federal Judges."

Abe Krash, James S. Portnoy, Erica Frohman Plave & Sarah Kahn Saunder, "Memorandum Concerning the Constitutionality of Canons 2(c), 3(a)(6), 4(a) and 7 of the Code of Judicial Misconduct."

William Slate, II, "Surveys of Knowledge and Satisfaction of Federal Judicial Discipline and Removal Mechanisms and Processes."

Emily Van Tassel, "The History of Federal Judicial Tenure, 1789–1979."

Dan M. McGill, "Disincentives to Resignation of Disciplined Federal Judges in the Benefits Package of the Federal Judiciary."

Ernest Gellhorn, Kathryn M. Fenton, Barbara McDowell & J. Peter Wang, Judicial Discipline and Removal: The Experience of Article I Courts.

V. RELATED SPECIAL REPORTS

Elizabeth Bazan, "Disqualification of Federal Judges Convicted of Bribery—An Examination of the Act of April 30, 1790 and Related Issues."

Jerome Marcus, "The 1790 Statute and Control of a Judge's Tenure in Office."

Timothy R. Murphy, "The Effects of Criminal Prosecution of State Judges on State Judicial Disciplinary Proceedings."

William Slate, II & Lucy G. White (Justice Research Institute), "New Paradigms of Judicial Discipline: Application of Foreign Models in the American System."

Library of Congress, "Judicial Tenure: Removal and Discipline in Selected Foreign Countries."

Michael Straight, "Accountability for Racial, Religious, Ethnic and Gender Bias Misconduct and Sexual Harassment by Federal Judges."

APPENDIX II
NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL

LIST OF CONCLUSIONS AND RECOMMENDATIONS
WITH AN IMPLEMENTATION UPDATE*
NOVEMBER 29, 2001

CONSTITUTIONAL ISSUES

The Commission concludes that Article III judges constitutionally may be prosecuted, convicted, and punished, and that the punishment may lawfully include incarceration.

The Commission concludes that Article III judges constitutionally may be subjected to state prosecution and incarceration. Although Congress has power to create some privileges against such prosecutions, the Commission concludes that such statutory privileges would be unwise.

The Commission concludes that a circuit council constitutionally may use its statutory authority to assign and reassign cases, and otherwise control the judicial duties, of a judge who has become disabled.

The Commission further concludes that a circuit council constitutionally may use its statutory authority to control the assignment and reassignment of cases and other judicial functions of an implicated judge during the criminal process, from investigation and indictment through the expiration of sentence, including a term of probation.

The Commission concludes that a statute providing for the removal from office of judges who serve on good behavior under Article III by means other than impeachment and conviction would be unconstitutional.

The Commission recommends that section 201 of title 18, United States Code, be amended to make clear that it does not authorize the removal of any judicial officer who serves during a term specified in the Constitution.

The Commission concludes that a statute under which a judge's compensation would be suspended on the basis of a criminal conviction would be unconstitutional.

The Commission recommends adoption of a statute under which a judge who has been convicted of a felony shall not hear or decide cases unless the circuit council determines otherwise.

The Commission recommends retaining the political mechanism of impeachment by the House and trial by the Senate as now provided in the Constitution. The impeachment process is the sole appropriate means for the removal of life-tenured judges.

The Commission recommends against a constitutional amendment under which convicted judges would be removed automatically.

The Commission recommends against the creation of a new organ of government that would have the authority to discipline and remove federal judges.

The Commission opposes the suggestion that Congress should be able to determine by statute the way in which federal judges are removed.

The Commission opposes any proposal under which the Supreme Court would participate in the removal of federal judges.

The Commission concludes that the current constitutional standard for impeachment, as interpreted over the years, has been adequate to its purpose and recommends that it not be amended.

LEGISLATIVE BRANCH

The Commission recommends that the House Committee on the Judiciary continue to acknowledge every judicial discipline complaint. In serious cases involving potentially impeachable conduct, the Committee should conduct a follow-up inquiry or solicit the aid of the Justice Department in such an inquiry. The Committee should continue to keep a record of the number and nature of these complaints, and report these data each Congress.

The Commission recommends that the House ensure that its Committee on the Judiciary has the resources to deal with judicial discipline matters, and the resources and institutional memory necessary to deal with impeachment cases as they arise.

The Commission recommends that the House Committee on the Judiciary and the Justice Department—upon obtaining information that a federal judge has committed criminal acts that may be inconsistent with continued service on the bench—work cooperatively to resolve the removal issue, including, if desirable, postponing criminal proceedings.

The Commission recommends that the executive and judicial branches share with Congress information that might be useful to it when it considers whether to impeach a federal judge, subject to exceptions necessary to the law enforcement function and to protect serious confidentiality interests. Congress should enact legislation, with proper safeguards, to facilitate the exchange of this information in appropriate circumstances.

The Commission recommends that the House avoid repetition of prior fairly conducted proceedings. When impeachment proceedings follow criminal convictions, issue preclusion should be used except in unusual circumstances.

The Commission recommends that the House dispense with the filing of a "replication" to a respondent judge's answer.

The Commission recommends that the Senate consider experimenting with a variety of delegation approaches (including use of masters) to handle pretrial issues (especially discovery) prior to any removal trial.

The Commission recommends that the Senate consider amending its rules to permit a Rule XI Committee to transmit to the full Senate each Committee member's individual views regarding proposed findings of fact and recommendations on individual articles of impeachment.

The Commission recommends that the Senate consider adopting rules tailored to impeachment trials in which evidence is heard in a Rule XI Committee.

The Commission recommends that the Senate apply issue preclusion to matters necessarily determined against a judge in a prior criminal trial except in unusual circumstances.

The Commission recommends that the Senate compile a manual of impeachment source materials for participants in the proceedings and other interested parties.

The Commission recommends that the House Committee on the Judiciary, within its jurisdiction, exercise periodic oversight of judicial discipline, judicial ethics, and criminal prosecutions of federal judges.

The Commission recommends that the Senate review its confirmation proceedings involving judges prosecuted since 1980 to determine whether those proceedings were thorough and whether they revealed any problems suggesting a danger of misconduct by the nominees. The Senate review should be forward-looking, designed to avoid problems in the future.

The Commission recommends that the House determine, in its resolution, whether to seek both removal and disqualification in each impeachment proceeding.

The Commission recommends that, regardless of whether the House asks for disqualification, the Senate vote on disqualification from holding future office as well as on removal from office of judges convicted in impeachment trials.

The Commission concludes that no formal institutional linkages need be established among or between the branches of government. A permanent National Commission on Judicial Discipline and Removal is not necessary.

The Commission recommends informal meetings of high-level representatives of the three branches of the federal government to promote oversight and understanding of judicial discipline, disability, and impeachment.

The Commission recommends that the Administrative Office routinely provide the House Committee on the Judiciary with all final orders and accompanying memoranda required by the 1980 Act to be publicly available.

EXECUTIVE BRANCH

The Commission recommends that the Justice Department promulgate guidelines and procedures for its attorneys regarding the circumstances under and the manner in which the mechanisms of the 1980 Act are to be utilized.

The Commission recommends that convicted judges who fail to accept responsibility for their conduct not receive reduced sentences, and in any event that sentencing judges be sensitive to the effects of their sentences on the decision of a convicted judge to resign voluntarily from judicial office.

The Commission recommends that the FBI and the Justice Department issue explicit guidelines and procedures for the investigation and prosecution of federal judges, and that these guidelines and procedures require the approval of the Attorney General for full-scale investigations and intrusive investigative techniques.

The Commission recommends that the Justice Department consult with the U.S. House of Representatives at appropriate times during an investigation and prosecution of a federal judge, whenever the facts suggest that impeachment is a likely out-

come. The timing of impeachment and criminal proceedings should be a matter dictated by the facts and circumstances of each case. Ideally, this decision should be made by mutual agreement of the branches.

The Commission recommends that FBI full-field investigations of judicial candidates be as comprehensive as reasonably possible to ensure sound judgments about their integrity and qualifications.

JUDICIAL BRANCH

The Commission recommends that Illustrative Rule 1(e) be revised to provide that the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long; a petition for mandamus can sometimes be used for that purpose. Discipline under the 1980 Act may be appropriate, however, for (1) habitual failure to decide matters in a timely fashion, (2) delay shown to be founded on the judge's improper animus or prejudice against a litigant, or (3) egregious delay constituting a clear dereliction of judicial responsibilities. The Commission also recommends that all councils and the several courts subject to the 1980 Act adopt this Illustrative Rule as revised. [Change made to the commentary of the Illustrative Rule.]

The Commission recommends that a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal or state criminal authorities and of the House Judiciary Committee. In situations where the chief judge or circuit council believe it inappropriate to act as an intermediary, the Commission recommends that they notify the complainant of the names and addresses of the individuals to whose attention the charges might be brought.

The Commission recommends that the 1980 Act be amended to include as an additional ground for dismissal by a chief judge that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation. [Illustrative Rule amended.]

The Commission recommends that the Judicial Conference of the United States add to the text of Canon 2 or Canon 3 of the Code of Conduct for United States Judges an express prohibition of judicial behavior that reflects or implements bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment. Unless the complaint's allegations are directly related to the merits of a decision or procedural ruling, such behavior in a judicial capacity is an appropriate subject for discipline under the 1980 Act.

The Commission recommends that the bar and the federal judiciary increase awareness of and education about the 1980 Act among lawyers, judges, court personnel, and members of the public. As one part of such efforts, each circuit council that has not already done so should publish its rules under the Act in United States Code Annotated, and a reference to the 1980 Act and the circuit council's rules should be included in the local rules of each district court.

The Commission recommends that each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints against federal judges. Such groups should also work with chief judges in efforts to identify problems that may be amenable to informal resolutions and should initiate programs to educate lawyers and the public about judicial discipline. The Commission also encourages other institutions, including the organized bar, to take an active interest in the smooth functioning and wise administration of formal and informal mechanisms that address problems of judicial misconduct and disability.

The Commission endorses Illustrative Rule 4(b) and recommends that the 1980 Act be amended to provide that a chief judge may conduct a limited inquiry into the factual support for a complainant's allegations but may not make findings of fact about any matter that is reasonably in dispute.

The Commission recommends that chief judges seek assistance from qualified staff in reviewing complaints and preparing orders. It encourages chief judges to consult other judges who may be helpful in the process of complaint disposition. The Commission does not believe that the 1980 Act, including its provision on confidentiality, constitutes a barrier to such assistance or consultation.

The Commission recommends that the Illustrative Rules be amended to permit chief judges and judicial councils to invoke a rule of necessity authorizing them to continue to act on multiple judge complaints that otherwise would require multiple disqualifications.

The Commission recommends that all judicial councils adopt and strictly adhere to Illustrative Rule 17 as it relates to the public availability of a chief judge's orders dismissing complaints or concluding proceedings and any accompanying memoranda. Care should be taken to eliminate information that would identify the judge or magistrate. If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

The Commission recommends that council rules regarding confidentiality should be nationally uniform. The relevant provisions of the Illustrative Rules should be adopted to that end, but the uniform rules should not provide for automatic transmittal of a copy of complaints to the chief judge of the district court and the chief judge of the bankruptcy court. **They should, however, authorize a chief judge to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act.** [Adopted by some circuits; not all.] **If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.**

The Commission recommends that, as provided in Illustrative Rule 4(f), a chief judge who dismisses a complaint or concludes a proceeding should "prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition." This memorandum should "not include the name of the complainant or of the judge or magistrate whose conduct was complained of." In the case of an order concluding a proceeding on the basis of corrective action taken, the supporting memorandum's statement of reasons should specifically describe, with due regard to confidentiality and the effectiveness of the corrective action, both the conduct that was corrected and the means of correcting it. If action by the judicial councils or Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

The Commission recommends that the Judicial Conference devise and monitor a system for the dissemination of information about complaint dispositions to judges and others, with the goals of developing a body of interpretive precedents and enhancing judicial and public education about judicial discipline and judicial ethics.

The Commission recommends that the Judicial Conference, assisted by the Administrative Office, reevaluate the adequacy of all data and reports gathered and issued concerning experience under the 1980 Act, including the system used to provide such data and reports in each circuit. The Commission also recommends that, as part of such general reevaluation, consideration be given to gathering and reporting data on complaints about bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment.

The Commission recommends that section 332 of Title 28, United States Code, be amended to require each circuit council to report annually to the Administrative Office of the U.S. Courts the number and nature of orders entered thereunder that relate to judicial misconduct or disability (including delay).

The Commission recommends that the Judicial Conference adopt a uniform policy on the limitations a judicial council should impose on a judge who is personally implicated in the criminal process. At a minimum that policy should include ordinarily relieving a judge under indictment from all judicial responsibilities through to the end of the criminal process and imposing appropriate constraints on judicial responsibility where a judge is under investigation.

The Commission recommends that Congress consider enacting a statute providing that, upon conviction of a felony (or more specifically defined crimes), a federal judge shall cease to accrue credit, through age or years of service, toward retirement under the Rule of 80. [Judicial Conference passed a resolution to this effect.]

The Commission recommends that the Judicial Conference and the circuit councils consider programs of judicial evaluation for adoption in the federal courts.

The Commission recommends that the Judicial Conference reexamine the practice of specifically notifying a federal judge when a request for access to the judge's financial disclosure forms is made, to determine if valid security or other concerns justify continuation of the practice. [Judicial Conference reexamined the practice but expressly rejected any change.]

The Commission recommends that the public disclosure requirements under federal law be amended to require a federal judge either (1) to certify that, to the best of his or her knowledge, information and belief, the judge does not, except as permitted by Canon 2(c), hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin or (2) to list all organizations not exempted under Canon 2(c) of which the judge is a member.

The Commission recommends that the Judicial Conference adopt a mandatory self-reporting rule that requires federal judges to inform designated authorities (e.g., the circuit chief judge), on a confidential basis, whenever they have been indicted, arrested, or informed that they are the target of a federal or state criminal investigation. Such a rule should not apply to minor offenses. [Judicial Conference only urged each council to adopt a mandatory self-reporting rule.]

The Commission recommends that the Supreme Court may wish to consider the adoption of policies and procedures for the filing and disposition of complaints alleging misconduct against Justices of the Supreme Court.

The Commission recommends that each circuit that has not already done so conduct a study (or studies) of judicial misconduct involving bias based on race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment, and of the extent to which the 1980 Act and other existing mechanisms and programs, including judicial education, are adequate to deal with it. The Judicial Conference should monitor the implementation of this recommendation and when such studies have been completed, consideration should be given both locally and nationally within the judiciary to such changes in policies, procedures, and programs as are warranted.

Italic* signifies a conclusion or recommendation that does not require implementation. **Bold signifies a conclusion or recommendation that has been implemented.

Mr. COBLE. Your Honor, it is good to have you here. Judge Osteen, you are recognized as the final witness on this panel.

STATEMENT OF THE HONORABLE WILLIAM L. OSTEEN, U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Judge OSTEEN. Mr. Chairman, Members of the Committee, Mr. Kendall, Mr. Remington and Professor Hellman, I want to thank you for the opportunity to be here today.

Mr. Chairman, one correction that I would like to make your introduction. As I recall, 30 years ago when we worked together, we worked together and not for each other. I was not your boss. But I remember us working together well, and I shall remember those days with a great deal of pleasure. Thank you for your contribution.

Mr. COBLE. Thank you. But you were still my boss.

Judge OSTEEN. Mr. Chairman and Members of the Committee, I would like to rest on the testimony that I have submitted to you. I am confident that Members of the Committee will read what I had to say, and I tried to draft it with care to present the points that I was trying to make.

In summary, my field generally deals with two of the things that have been discussed here and may be on your agenda. One is the

recusal statute of 28 U.S.C. 455, which is the embodiment of the canon of ethics 3C(1), including C subdivision.

I want to say, Mr. Chairman, a couple of things about the attendance at seminars. I have been there. I have attended the FREE seminar—that is capital F-R-E-E. I have attended the George Mason seminars—three of them. And I want to say, Mr. Chairman, that in my opinion, an effort to stifle the free flow of human discourse would be a serious matter. Judges, I believe, try to do what they can properly and with ethical considerations at all times; and I believe in this day, when we have substantial new legislation coming in, substantially new ideas on various aspects of each piece of that legislation, that a judge simply cannot keep up with some things without the help of the Federal Judicial Center and the independent help that it receives from other sources.

But, particularly, I want to talk about the kind of help that has come from the seminars that I have attended. It is not telling judges how to judge—not at all. It is telling judges, here are some alternative things that you may think about, which may include an opportunity to exercise your mind. And I think one of the most essential things that we can require of judges today is that we do try to exercise our minds and not close ourselves in.

So, Mr. Chairman, with what I have said in the testimony that has been previously submitted, I do want to say that I believe that an opportunity for judges to obtain information, even not in the field of judicial concern, but in other fields—in music, in philosophy and all of the other courses that might be available—it is helpful to judges to have access to that kind of information.

I do believe that Advisory Opinion 67 is viable and active. There seems to be some slight indication here that this is all something new and has suddenly been discovered in the last year or two, that judges are attending some seminars. There is nothing new about this, Mr. Chairman. It has been going on, to my knowledge, for 30 years and there is nothing secret about it. It is open. Turn to Web sites and you will find exactly what is on the menu of these various programs.

Now, I realize I am constrained by time limitations, so I want to turn just a moment to the question of recusal because of stock ownership. I submit, Mr. Chairman and Members of the Committee, that the judiciary has not done a perfect job, because I don't believe that I will ever see the time that perfection is obtained in any field. But we strive for it, and that is what we look for.

So is this question that is raised legitimate from the standpoint of consequence or size or volume? I say no, Mr. Chairman. I say, there have been mistakes made; but I also say, if you take every challenge that has been raised—which I do not—to the failure to recuse, you will find that there have been less than 100 over the last 3 years.

A review of how many cases are handled by judges in the last 3 years, taking a 2-year average, would be 560,000 cases. That means of the ones that had been found by judges themselves, by a committee or by individuals, that means that .00017 percent had some allegation of wrongdoing about them. To put that in another form, that is 17 ten-thousandths of a percent in which there is an allegation that something might be wrong.

Maybe we will get an opportunity to answer questions, which I will be happy to do on either of those two topics or anything else that may be posed to me. But I thank you for the opportunity to be here.

Mr. COBLE. Thank you, Your Honor.

[The prepared statement of Judge Osteen follows:]

PREPARED STATEMENT OF WILLIAM L. OSTEEN

Mr. Chairman and Members of the Subcommittee:

I thank you for the opportunity to address the subject of seminars for judges and the subject of judicial recusal, as the latter is addressed in 28 United States Code § 455 and Canon 3C(1)(c) of the Code of Conduct for United States Judges.

I. PRIVATELY FUNDED SEMINARS

INTRODUCTION

I would expect that the members of your Committee would have little idea of who I am, so please allow me to introduce myself as it may be material to the matters for your consideration. From my childhood through college, my father served as a probation officer in the federal courts. In that atmosphere, I learned a great respect for the federal judiciary. During law school, my admiration for the integrity of the court increased with each opportunity I had to visit the federal district court. Judge Johnson J. Hayes of the Middle District of North Carolina was my first hero. Throughout 30 years of private practice of law, my specialization was almost exclusively in federal court litigation, both civil and criminal. My private practice was interrupted by the five years I served as United States Attorney. Ten years ago, I was appointed to the federal bench. I have for six years been a member of the Judicial Conference's Committee on Codes of Conduct. I presently serve as its chairman. I do not consider myself an expert in the field of ethics for federal judges, but I am an avid student of the subject. The only experts of my acquaintance are Judge Raymond Randolph of the D.C. Circuit and Judge Carol Amon of the Eastern District of New York, both former Chairs of this Committee, along with two current members of the Committee.

The significance of this historical reflection prompts me to state, perhaps immodestly, but very proudly, that few people here today have longer admired, both personally and professionally, the integrity and independence of federal courts. I believe my enthusiasm for the third branch of government is shared by all of my judicial colleagues.

SEMINAR PARTICIPATION

In the interest of full relevant disclosure, I have attended the Foundation for Research on Economics and the Environment (FREE) seminar in Bozeman, Montana—not at a dude ranch, as some may suspect, but at an accommodation with a nice restaurant, a reasonably good meeting room, and sleeping accommodations in surrounding cabins. It was an interesting seminar concentrating mostly on past, present, and anticipated future attempts to save Yellowstone National Park. I have also attended three George Mason School of Law, Law and Economics Center seminars. The first was a basic introduction to Economics and Statistics. As a college graduate in Economics, I was able to follow a good deal of the lecture material. The second seminar involved microeconomics and other advanced theories of economics. I struggled substantially to keep up with new theories and application of economics. Finally, the last was a seminar entitled "Individual Responsibility and Culture," in which among others, the writings of St. Augustine, Burke, Rousseau, and Nietzsche were examined—an absolutely fascinating presentation.

All of the LEC seminars were intellectually taxing, requiring much advanced preparation with reading before and after arrival at a nice Tucson, Arizona, hotel. There was some time for relaxation, but I chose sightseeing and I played golf—all at my own expense.

As easy as it would be, it is not my purpose or responsibility to proclaim the preeminence of the George Mason LEC in its field, but make no mistake, I believe the LEC selects lecturers with impeccable credentials and does an excellent job of helping judges exercise and improve the use of their intellect and judgment. I could not discern from the lectures and association with the LEC leadership whether it espouses a liberal or conservative philosophy. The programs were highly academic and not political. Some of the lecturers were Nobel laureates—Milton Friedman and Paul Samuelson. Others were nationally acclaimed academics in their chosen

fields—Francis Fukuyama of George Mason; George Priest, Yale Law School; Gordon Wood of Brown; Jean B. Elshtain, University of Chicago Divinity School; and two of my personal favorites, Orley Ashenfelder of Princeton and Charles Goetz, University of Virginia Law School—none of whom shared their political philosophies. All lecturers were highly competent in their chosen fields of endeavor. None would have sullied their own reputations by attempting to instruct judges on how to judge. They exposed our minds to reason and alternative fields of academia. The audience of judges included a few individuals appointed by Presidents Carter and Reagan and a pretty even number of individuals appointed by Presidents Bush and Clinton.

ATTRIBUTES OF JUDGES

In order to address the appropriateness of privately-funded seminars, we should first consider what we expect judges to be. Contrary to the urging of some, I do not believe judges should separate themselves from human discourse. Of course, the public has an absolute right to expect that judges will maintain the integrity and independence of the third branch. Judges should avoid impropriety and the appearance of impropriety in all activities. Judges should perform their duties impartially and diligently. All of this is in keeping with the Code of Conduct for United States Judges and the later-enacted statutory version 28 U.S.C. § 455. The standard has been prepared for and set by judges themselves. No other group has prepared its own code of conduct subject to such exemplary or strict requirements. All of this is part of, but not the full measure for, defining excellence in the Judiciary.

I submit that a good judge is one whose mind remains active and alert. It would be inappropriate to require tunnel vision of judges, for you would soon find that the judges had closed out the ability to evaluate factual and legal concepts. I know that the Chairman of your Committee had an active trial practice before becoming our Congressman and perhaps others of you have experienced trial practice. You may draw your own conclusions, but as for me, I preferred to appear before a judge who had an active, inquiring, and challenging mind, one who could decipher complicated issues of technology and change, and understood the precedential value of legal history, along with the common sense to appreciate the value of everyday life. I submit that a judge can best fulfill the obligation of this responsibility by maintaining an active, personal interest in mind-improving experiences, such as music, art, baseball, religious study, principles of economics, political history, and the list goes on and on. Judge Learned Hand captured the point poignantly when he said,

> I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rubelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him.

Listening to Nobel laureates Paul Samuelson and Milton Freedman, or such outstanding notables in their fields, I have already named, is part of continuing education for judges much to be desired. These are the types of presentations for which an institution should receive commendation—not condemnation.

CRITICISM OF SEMINARS

I read with interest, though much disagreement, the submission to this Subcommittee by Mr. Kendall of the Community Rights Counsel. First, let me address a few small matters perhaps included in his comments to arouse suspicion. His paper refers to the LEC and FREE seminars as junkets to exotic, posh places. That is obviously an attempt to arouse your emotional animosity. Interestingly, and quite properly, no one voices an objection to the Federal Judicial Center's seminar locations as either junkets or exotic. Now, I ask you which are more exotic—Miami, San Diego, Portland, Philadelphia, Cold Springs Harbor—sponsored by the FJC or Tucson and Bozeman, privately sponsored? None were posh. Frankly, I liked them all, except one. None of them appeared to be "exotic"—I found all of the places to be appropriate. While I have no personal knowledge, I am reliably informed that seminars can be held in such locations at considerably less expense than in Washington or New York. I should note in passing that the FJC does an excellent job of seminar planning for both location and content. My comparison here in no way impugns the quality or the frugality of its presentations.

Second, Mr. Kendall would have you believe that concern about these seminars is of recent origin when he says, "three years ago when word of these trips first came to light. . . ." An even cursory review of the public record establishes that

since the early 1970's the Aspen Institute, the University of Miami's LEC, the Danforth Foundation, New York University, Center for Advanced Studies at Stanford, the Einstein Institute, various Ford Foundation funded enterprises, and others too numerous to mention, have been inviting judges to seminars. Law schools have offered free opportunities for judge participation in seminars for many years before that. In 1978, the Advisory Committee on Judicial Activities (predecessor to the Committee on Codes of Conduct) advised that judges could accept those invitations. News articles in 1979–80, including The Legal Times, Fortune, and The Washington Post, publicly discussed private seminars for federal judges. So, to claim that this is a new exposure simply, at best, overlooks the obvious. I believe that the George Mason LEC program has been in existence for 25 years. It is listed on a website where a review of its courses and subjects are available to anyone upon inquiry.

There is, however, a more serious allegation by the CRC which results from an incorrect understanding of Advisory Opinion 67. To set the stage, Mr. Kendall quoted my telling "20/20," "I have no idea where [LEC] gets its money." This is obviously intended to prove that I have a callous disregard for an ethical obligation. Mr. Kendall did not consult me about this quote, and he was not obligated to, but if he had, he would have found that I advised "20/20" that it was unnecessary to check on the source of funding to George Mason because, under the circumstances, Advisory Opinion 67 does not require it. It requires that I determine the detail of funding if the source is involved in litigation or likely to be involved *and* the topics covered in the seminar are likely to be in some manner related to the subject matter of litigation pending or impending before me. Of course, the explanation never made it through the cutting room at "20/20." The linchpin of CRC's major complaint is thus misplaced. It is my understanding that corporations contribute no more than a token portion toward seminar expenses. In fact, support for George Mason LEC's seminars comes mostly from other than corporations. In 2001, corporate support accounted for 13% of LEC's revenues. The average corporate donation was 0.7% of revenue.

Certainly, judges must be mindful that if a seminar is sponsored by actual or potential litigants in a judge's court and the topics covered are likely to be related to the subject matter of the litigation, then a judge should not attend. That would be in conflict with the rules of conduct and I think we would all agree that it would be inappropriate. Advisory Opinion 67 is quite clear in reaching that decision.

Other criticisms on this subject appear to rest on faulty assumptions. For example, there is the assumption that the seminars are designed by corporations in litigation before the attending judges. Yet, I have seen no evidence to support that assumption. On the contrary, the seminars in question were offered by a private foundation (FREE) or a law school (George Mason). Each was responsible for the design and content of the program. Not only did the seminar planners inform us of this fact, but it is borne out by the fact that each seminar asks judges to rate the faculty and make suggestions for change. George Mason University is on record that its judicial seminars are funded completely by the Law and Economics Center and it has established a Judicial Advisory Board consisting of distinguished jurists from throughout the nation whose responsibilities are to suggest and help select appropriate subjects and places for its seminars.

Second, there is an assumption that judges who attend these seminars are improperly influenced by corporate interests. The supporting evidence for that assumption is also missing. Besides, Advisory Opinion 67 counsels: "Judges are continually exposed to competing views and arguments and are trained to weigh them." Let me suggest that in this modern day of proliferating litigation, some caused by Congressional enactment, some by increased population, and some by the nimble minds of a litigious society, seminars are a necessity. Judges need exposure to ideas and concepts. This would be true even if some presentations are not balanced in content. Judges are constantly faced with unbalanced presentations in the course of litigation and early on recognize that the law contains more ponderables than absolutes. The fact that some presentations are not balanced should not prevent exposure to new and innovative and sound reasoning.

THE ADVICE IN ADVISORY OPINION 67 IS VALID

There is substantial proof that Advisory Opinion 67 is well reasoned and appropriate. For 21 years that opinion has been in place and there is no evidence that judges are making improper decisions after attending a privately funded seminar. How am I able to assert that? The same way we evaluate all other decisions—by looking at the appellate process. The appeals or lack of appeals—which are just as telling—reveal that judges are not being improperly plied with propaganda. That record speaks volumes.

The Second Circuit Court of Appeals in *Aguinda v. Texaco*, 241 F.3d 194 (2nd Cir. 2000), met head on this same issue which CRC raises today. Judge Winter writing for the unanimous court reviewed Advisory Opinion 67 and the statutory counterpart, 28 United States Code § 455(a) and concluded that there was no actual or perceived impropriety in the trial judge's private seminar attendance. The standard used in arriving at that decision was the perception in the eyes of a reasonable person.

The Chief Justice of the Supreme Court has spoken eloquently in support of the continuing opportunity for federal judges, and I quote, "Seminars organized by law schools, bar associations and other private organizations are a valuable and necessary source of education in addition to that provided by the Federal Judicial Center."

Most emphatically, the Federal Judges Association, on September 18, 2000, voiced its support for privately funded seminars and its objection to an impingement upon legitimate First Amendment rights. But, for a moment, let's examine that. Suppose you do have a right to limit my access to private seminars which invite me without cost. Could you prevent my attendance if I pay for it? I think not. Then what have you accomplished? Is the objection because it is free or because of its content? And further, if you could limit my access to free or paid for education—what then? I will have the option of the Internet. I can also pay for my own volumes which may be more unbalanced. With all due respect, the Congress should abstain from any attempt to limit the access of judges to knowledge and information. The Judiciary itself has exercised the responsibility and it possesses the capability to continue to set its own code of conduct for learning opportunities.

Significantly, the organization of attorneys specializing in federal practice, The Federal Bar Association, 15,000 members strong, supports the continuing opportunity of education at private seminars for federal judges.

Finally, the United States Judicial Conference has continually reexamined the educational opportunities for judges over the last 20 years and concluded that our present opportunities are appropriate. The Judicial Conference has made no recommendations for change.

PROBLEMS WITH LEGISLATION

It imposes a serious threat to the separation of the branches of government for one branch of the government to impose its will on the other by limiting access to knowledge.

As much as I respect the Federal Judicial Center, I do not choose that group or any other as the censor of my right to increase my knowledge. Neither do I want any group to determine for me when I have had a balanced meal or a balanced input of knowledge.

The Federal Judicial Center, with its excellent organization, has neither the necessary funding nor the manpower capability to set and provide appropriate parameters and programs for my access to knowledge.

Legislation which closes a circle around judges necessarily closes out important and helpful local and state and national bar associations, law schools, and generally all institutions of higher education. It would probably prohibit our association with other government entities. It could, for example, prohibit my attendance at a church retreat focusing on the relationship of church and state, or other meaningful community subjects.

CONCLUSION

The Judiciary has set imposing and adequate standards for judicial education which have been successful over a long period of time. Courts have affirmed the opportunity for judges to acquire knowledge. Lawyers with federal trial experience have endorsed the educational opportunity programs.

The wheel is not broken, it is not bent, and is operating efficiently. Relevant evidence reflects that Congressional intervention is not required and such attempt could have extremely damaging and unjustified ramifications.

II. RECUSAL UNDER 28 U.S.C. § 455
AND
CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 3(C)(1)

INTRODUCTION

Canon 1 of the Code of Conduct for United States Judges states that judges should uphold the integrity and independence of the Judiciary. Canon 3C(1)(c) requires a judge to recuse or not participate in litigation in which the judge or the judge's spouse or minor child residing in the judge's household owns stock. All other canons are aspirational—only 3(C)(1) is mandatory. Congress has enacted 28 United

States Code § 455, which is a mirror image of Canon 3C(1)(a)-(e). It is absolutely clear that judges cannot preside over litigation in which the judge or his wife own stock in the litigant. This is an appropriate, understandable requirement and is not subject to debate. We, as judges, should strive for and the public has a right to expect compliance with that mandate.

HISTORY OF RECUSAL

The standards for recusal of federal judges are set forth in 28 U.S.C. § 455 and the corresponding Code of Conduct for United States Judges, Canon 3C(1). These provisions, which date from the 1970's, have historical antecedents stretching back centuries, even millennia. Principles of judicial fairness are reflected in ancient Talmudic writings. Early Jewish and Roman civil codes also provided for disqualification of judges due to personal relationships or bias. In our more recent legal tradition, the British common law allowed for disqualification of judges due to financial interest.

The earliest statutory provision in this country dates from 1792, when Congress provided for disqualification of judges who had an interest in a matter or had previously acted as counsel in a cause. Similar fundamental values are embodied in the Constitution's due process clause. Trial by an impartial judge is considered an essential element of due process in judicial proceedings.

Over the past two centuries, Congress has expanded the statutory recusal standards to address a number of specific situations. For example, under 28 U.S.C. § 455, judges are disqualified from handling matters if they previously served as an attorney in the matter, or if a close relative is involved as a witness or party, or if they know they have a financial interest in one of the litigants. In each of these situations, reasonable questions about a judge's impartiality are simply presumed, irrespective of the particular facts and circumstances. These situations fall within the specific recusal standards of the statute.

Judges may also be disqualified under § 455's general recusal standard. That standard provides for disqualification in any proceeding in which the judge's impartiality might reasonably be questioned. Under this standard, disqualification is not assessed from the perspective of the litigants or the attorneys or even the news media. Rather, it is assessed from the point of view of a reasonable person informed of the relevant circumstances that a reasonable inquiry would disclose.

These general and specific standards have been incorporated in § 455 for several decades. I believe the statute sets forth appropriate standards of conduct and has operated effectively. This is due in large part to the approach Congress adopted. That is, the statute provides for automatic disqualification only in circumstances where there is general consensus about likely partiality or where (as in the case of disqualification due to financial interest) there is some advantage to a bright line rule. Further, the statute does not attempt to anticipate every possible disqualifying scenario that might arise but instead addresses a limited number of predictable situations that commonly occur. The general disqualification standard serves as an overall check on judicial conduct falling outside of the specific, listed scenarios.

As a practical matter, the federal disqualification statute relies on individual judges to make individual assessments about their ability to handle a matter fairly and impartially. Fact-specific determinations are an essential part of this process. While individual judges are responsible in the first instance for deciding whether to recuse or not, their determinations are ultimately subject to appellate review. Indeed, federal appeals courts have not hesitated to review district judges' recusal determinations when they have been challenged by way of mandamus or appeal. Just this year, courts of appeals in Washington, D.C., and in Boston ordered district judges to recuse because of concerns that their comments to the press gave rise to reasonable questions about their impartiality: *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. June 28, 2001), and *In re: Boston's Children First*, 244 F.3d 164 (1st Cir. March 2, 2001).

RECENT DEVELOPMENTS

In 1998, a reporter for the Kansas City Star, Joe Stephens, brought to our attention that in some 57 cases judges had issued one or more orders while the judge or the judge's spouse owned stock in a litigant. Since then, CRC, which requested and was given access to judges' financial filings, claims to have found 17 more cases in which judges or spouses owned a disqualifying interest. Based on these two facts, CRC blatantly concludes and I quote, "judge [sic] are honoring in the breach the golden rule against ruling in cases in which they have a disqualifying financial conflict of interest." That conclusion, which presumes that the Judiciary is intentionally violating ethical standards, is absolutely incorrect. Please let me explain.

First, in the interest of fairness, I must state that CRC's research is incomplete. In addition to the previously mentioned cases, in Minneapolis, it was alleged that judges had issued orders in four cases, while possessing a disqualifying stock interest. In New York, it was contended that approximately 14 cases had been improperly handled. At least four other cases have been reported throughout the country. That is a total of 96 cases rather than CRC's alleged 74 matters.

Second, there are important matters that CRC has conveniently left unsaid, such as:

- in a large number of cases, the judges had ruled on non-substantive matters—such as setting schedules for pretrial discovery or granting extensions of time within which to file pleadings;
- in some cases, spouses had purchased stock without the judge's knowledge;
- some litigants had purchased entities or had been purchased without the judge's knowledge;
- in a few of the cases, the allegations of wrongdoing were incorrect for having been erroneously based upon the yearly financial disclosures rather than current recusal lists.
- even critics concede they have no evidence that judges profited individually or skewed their decisions because of their stock holdings;
- and, yes, in some cases, the presiding judge had, for whatever reason, failed to recuse.

In not a single one of the reported 96 cases has there been a reversal on substantive grounds. There have been no appellate decisions reversing the trial judges for reaching the wrong substantive decision. I am not offering these mitigating factors as an excuse or justification for imperfection, but they conclusively reveal no intended harm or resulting harm.

But let us for a moment consider the size of the problem by adding the 74 cases cited by CRC and the additional 22 cases, for a total of 96. These cases represent all allegations found over a three and one-half year period. In 1999, an average year, there were 264,000 new civil cases filed in federal court. Using the two-year average life expectancy of federal litigation, that means during 1999 and 2000, there were approximately 528,000 active cases within various federal jurisdictions. Assuming that in each of the 96 cases there was improper judicial participation, it follows that in 0.00017% of all cases in the federal system, there is evidence that a judge may have signed an order or presided when the judge should have recused. That's not perfection, but it is mighty close. It refutes CRC's contention of honor in the breach.

Now, since the original Kansas City Star article, a number of entities and individuals, including Joe Stephens and CRC, have filed requests for my annual financial disclosures. I have more than a hunch that financial disclosures for all federal judges have been meticulously reviewed. Since 1998, the number of Canon 3(C)(1) and § 455 allegations has continually decreased. This is not by accident. I, for one, want to credit Joe Stephens for doing an outstanding reporting service. He has made judges acutely aware of the consequence of failure to demand perfection in our recusal responsibilities. But other things have happened to improve our system. We now have computer-assisted automated conflicts screening. Federal rules have been amended to require disclosure of corporate parents for litigation. Model checklists have been developed to assist judges in preparing recusal lists. (See attached exhibit.) The Judicial Conference has been much involved in assisting judges with their obligation.

Also, I am extremely proud of our Codes of Conduct Committee. Before 1998, we were fulfilling our assigned responsibilities by advising judges upon their inquiries. We were not and are not an enforcement or investigative agency. However, because we recognized a need, members of our Committee have made themselves available to all bankruptcy, magistrate, and district judges' conferences to discuss this important matter of recusal. We have offered to speak to all circuit and national conferences of judges. With the help and support of the Federal Judicial Center, we have received invitations to speak at recent conferences of judges. (See attached list of our Committee's participation and training seminars.)

It has been argued that obtaining a judge's annual financial disclosure report presents great difficulty, apparently for the reason that judges are notified when a request is made. I disagree that such notification causes the requester great difficulty, but for the moment let us suppose that it does. What's wrong with notification? The financial statements contain a great deal more information than would be helpful to a litigant. To some extent, the difficulty prevents "judge shopping." It enables those responsible for security to be alert to matters which may cause danger to

judges. The public knowledge of a judge's financial condition has in some instances enabled the unscrupulous to frivolously and improperly levy upon and harass a judge's financial holdings. Especially in these times when heightened security measures are required, great care should be used in determining whether and the extent to which financial information should be made public.

Since the financial reports are yearly documents, they cannot be relied upon for recusal concerns. Judges like other citizens may and should restructure and compose their financial holdings much more often than a yearly statement would reflect. Thus, an up-to-date recusal list is more valuable than the financial statement for litigants.

For the same reason I support limited access to financial statements, I oppose the requirements of publicly filed recusal statements. There are many unique and quite different potential problems of security, harassment, judge shopping, and other distractions throughout the nation. What works in Greensboro, North Carolina, may be completely ineffective in Detroit or Denver, or New York. Let me give you an example—I still list my home telephone and address in the telephone directory. Although our U.S. Marshal protests my listing, it has caused me no difficulty. Public listing in some places throughout this country would border on stupidity or at least bad judgment. The same is true of public disclosure of recusal lists. Judges must be allowed to make their separate and necessary assessments based upon familiarity and uniqueness of their potential difficulties.

While I do not post my recusal list publicly, it is maintained in the Office of the Clerk. Upon inquiry of the Clerk, an individual may view that list, and I am not notified. So far, that has worked for me, and I will continue it until necessity requires a change. But I reiterate, what works for one may be legitimately unacceptable for another. Judges should have the right to make their own decisions on publishing or not publishing. I submit that the Judicial Conference is in the best position to determine the need for and the timing of rules concerning publication.

CONCLUSION

There is no evidence that failure to recuse for stock ownership is a pervasive matter. It is, however, important. The record of the Judicial Conference, the Federal Judicial Center, the Administrative Office of the U.S. Courts, individual judges, and the Committee on Codes of Conduct quite clearly indicates that the problem has been and will continue to be addressed. The record shows substantial reduction in the amount of errors occurring, and we will enthusiastically continue to strive for perfection. That goal will be best addressed by the Judiciary itself.

I want to emphasize that I am not requesting legislative amendment to the statute, and the Judicial Conference has no pending recommendations on this subject. I believe this reflects the consensus view within the Judiciary that the recusal statute is functioning properly and no reform is needed.

I thank you, Mr. Chairman, and the Members of your Subcommittee.

Checklist for Financial Conflicts

This checklist should assist judges in developing a list of all interests that may give rise to a financial conflict of interest. Judges should list each company or organization in which they or the relatives described below have a financial interest or connection. Do not list the amount of any financial interest or identify to whom the interest belongs. These conflicts of interest may not be waived.

Does the judge:

1. personally own stock, shares, or some other financial interest in a company? NO ☐ YES ☐ ⇨ list name of company
2. have an equitable interest (e.g., as a vested beneficiary) in an estate or trust that has a financial interest in a company? NO ☐ YES ☐ ⇨ list name of company
3. serve as an officer, director, advisor, trustee, or active participant in the affairs of an organization? NO ☐ YES ☐ ⇨ list name of organization
4. serve as a fiduciary of an estate or trust that has a financial interest in a company? NO ☐ YES ☐ ⇨ list name of company

Does the judge's spouse:

1. personally own stock, shares, or some other financial interest in a company? NO ☐ YES ☐ ⇨ list name of company
2. have an equitable interest (e.g., as a vested beneficiary) in an estate or trust that has a financial interest in a company? NO ☐ YES ☐ ⇨ list name of company
3. serve as an officer, director, advisor, trustee, or active participant in the affairs of an organization? NO ☐ YES ☐ ⇨ list name of organization

Does the judge's resident minor child:

1. personally own stock, shares, or some other financial interest in a company? NO ☐ YES ☐ ⇨ list name of company
2. have an equitable interest (e.g., as a vested beneficiary) in an estate or trust that has a financial interest in a company? NO ☐ YES ☐ ⇨ list name of company
3. serve as an officer, director, advisor, trustee, or active participant in the affairs of an organization? NO ☐ YES ☐ ⇨ list name of organization

Does the judge's third degree relative,[1] the judge's spouse's third degree relative, or the spouse of any of these relatives:

1. serve as an officer, director, or trustee of an organization? NO ☐ YES ☐ ⇨ list name of organization

[1]Parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew.

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Checklist for Other Conflicts

This checklist should assist judges in developing a list of certain matters that may give rise to a conflict of interest other than a financial conflict. This checklist does not include all matters that may require recusal but only those that can reasonably be identified in advance and recorded on a list to compare to the court's docket. Judges should include on their lists matters arising from their own activities, the activities of relatives, or the activities of certain attorneys. These conflicts of interest may not be waived. A judge may not preside over the cases described below.

Is the judge, the judge's spouse, the judge's third degree relative,[1] the judge's spouse's third degree relative, or the spouse of any of these relatives:

1. a party in a case? NO ☐ YES ☐ ⇨ list all such cases that are likely to come before the court
2. likely to be a material witness in a case (to the judge's knowledge)? NO ☐ YES ☐ ⇨ list all such cases that are likely to come before the court
3. an attorney who is likely to come before the court? NO ☐ YES ☐ ⇨ list name of attorney
4. an equity partner in a law firm that is likely to come before the court? NO ☐ YES ☐ ⇨ list name of law firm

Did the judge:

1. serve as an attorney in a matter? NO ☐ YES ☐ ⇨ list all such cases that are likely to come before the court
2. participate in government employment as counsel, advisor, or material witness concerning a matter? NO ☐ YES ☐ ⇨ list all such cases that are likely to come before the court

Did an attorney with whom the judge practiced law:

1. serve as an attorney in a matter during his or her association with the judge? NO ☐ YES ☐ ⇨ list all such cases that are likely to come before the court
2. serve as a material witness in a matter during his or her association with the judge? NO ☐ YES ☐ ⇨ list all such cases that are likely to come before the court

[1]Parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew.

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Conflicts List

List here all companies or organizations in which the judge or relative has a financial interest (from the Checklist for Financial Conflicts, form AO-300):

1. _____
2. _____
3. _____
4. _____
5. _____

List here all matters in which the judge has a disqualifying nonfinancial interest (from the Checklist for Other Conflicts, form A0-301):

1. _____
2. _____
3. _____
4. _____
5. _____

List here all attorneys and/or law firms related to the judge (from the Checklist for Other Conflicts, form AO-301) or whose appearance in a matter will otherwise cause the judge to recuse:

1. _____
2. _____
3. _____
4. _____
5. _____

Date: _____

RECENT JUDICIAL ETHICS TRAINING

Listed below are ethics training sessions for judges offered by the Federal Judicial Center and others featuring participation by members of the Codes of Conduct Committee, including training sessions currently planned for 2002.

Phase II Orientation for Newly Appointed Bankruptcy Judges

February 12 - 16, 2001, Washington, D.C.
Judge Peter Bowie

Workshop for Judges of the 6th Circuit

June 26 - 27, 2001, Mackinac Island, Michigan
Judges Peter Bowie and William Osteen

National Workshops for Bankruptcy Judges (I, II, and III)

July 25 - 27, 2001, Philadelphia, Pennsylvania
Judges Peter Bowie, William Osteen, and Robin Paige Donahue (9th Circuit)

January 14 - 16, 2002, San Diego, California
Judges Peter Bowie, William Osteen, and Robin Paige Donahue (9th Circuit)

May 6 - 8, 2002, Cleveland, Ohio
Judges Peter Bowie, William Osteen, and Robin Paige Donahue (9th Circuit)

Phase I Orientations for Newly Appointed Magistrate Judges

March 5 - 9, 2001, San Antonio, Texas
Judge Stapleton videotape; discussion led by mentor judges

August 6 - 10, 2001, San Antonio, Texas
Judge Stapleton videotape; discussion led by mentor judges

Phase I Orientation for Newly Appointed Bankruptcy Judges

June 11 - 14, 2001, Portland, Oregon
Judge Stapleton videotape; discussion led by mentor judges

Mediation Workshops for Magistrate Judges

April 2- 4, 2001, New Orleans, Louisiana
Mentor judges take the lead in the ethics presentation; other judges comment.

June 11 - 13, 2001, Minneapolis, Minnesota
Mentor judges take the lead in the ethics presentation; other judges comment.

Mediation Workshop for Bankruptcy Judges

September 10 - 12, 2001, New Orleans, Louisiana
Mentor judges take the lead in the ethics presentation; other judges comment.

Program for Bankruptcy Judges at Tulane University

May 15 - 17, 2001, New Orleans, Louisiana
Presentation on Public Ethics by Professor Gerald Guas of Tulane University

Mr. COBLE. And thanks to each of you.

As you just said, Judge, there is no entity or group of people known to me that scores perfectly. We have rotten Members of Congress. Most of us, I think, are pretty good people. I am sure most of the judges are.

This Committee—Howard, you will remember—I don't think—the two bills that are involved—we had to impeach judges. Not a pleasant undertaking at all. But on balance, I think the Federal judiciary is well represented.

Gentlemen, if you all concur, and Lady, we may have two rounds here, if time permits, because I think this is an issue that needs to be thoroughly examined. Let me put this question to each of the four, if I may, and ask you to offer a very general opinion as to the ethical state of our Federal judiciary.

First, do you believe that the great majority of Federal judges discharge their constitutional responsibility in an appropriate manner—A? B, do you believe that the existing statutory and canonical mechanisms, especially the Judicial Conduct and Disability Act, the recusal statutes and the code of conduct, work well and ultimately help to bolster public confidence in the Federal judiciary?

Mr. Kendall, let me start with you.

Mr. KENDALL. My answer to the first question is absolutely. I think the judicial branch, as a general matter, is the envy of the world. And, general matter, judges are exercising their constitutional authority both appropriately and excellently.

Regarding the second question, I don't think the misconduct and recusal statutes are doing a good enough job about policing legal and technical, or legal and ethical, obligations that do not rise anywhere near to the standards which would require impeachment. I don't think there are effective enough penalties now in place to police, for example, nondisclosure of information on disclosure forms, nondisclosure of a trip or stock conflicts, a contrast.

For example, what would happen if a Department of Justice attorney was found to have stock in a company that he was prosecuting? As I understand it, that attorney would be looking for a new job. And on the way out the door, he might be saying something about how his wife had obtained the stock or that it was a minor amount of interest, and he would be telling that to his next employer.

Now, contrast that to what happens in the stock-conflict category with judges. And I am not aware of any disciplinary action of any form taken against any of the judges that have been identified as having stock conflicts, for example, in the Kansas City Star story; maybe there are some in the Kansas City Star story identifying stock conflicts. So I don't think the judicial misconduct statutes are effectively policing what some would say are minor unethical legal transgressions by judges.

Mr. REMINGTON. As to the first question, I would say yes. As to the second, I used the phrase "reasonably well." I think the statutes are working reasonably well. There have been a great deal of improvements through congressional oversight since 1980.

Bear in mind that the Commission itself was created to study the operation of this statute and concluded that the judicial discipline and misconduct statute was working reasonably well. But I also agree that improvements could be made. I particularly agree with Professor Hellman's statement that not enough is known or understood about this statutory scheme.

Thank you.

Mr. COBLE. Professor?

Mr. HELLMAN. Thank you, Mr. Chairman.

Yes, I agree with Mr. Remington's comments and the first part of Mr. Kendall's. The Federal judiciary is composed of people who are overwhelmingly ethical in their behavior and in their instincts. And it might be useful to just say one or two words about why that comes about.

I think part of the reason is what I mentioned in my initial comments, the appointment process. People who are ethically challenged don't get through that process. It is a very, very demanding kind of scrutiny.

Second, there is an elaborate structure for reinforcing ethical norms, and it works within Judge Osteen's committee and works within the circuits, it works within the districts and it works at every level of the judiciary.

The third thing I would like to mention, because it perhaps is not as self-evident as the others: the judiciary has an excellent staff; and I think if we had a chance to talk a little bit more about the informal processes, we shouldn't understate or overlook the result of staff. Sometimes lawyers would not be willing to talk to a judge about a problem, but a staff person may hear about it, and a good staff person will get the word either to the judge who is the subject of the comment, or to the chief judge or somebody else in power. So the conditions are optimum, I think, for high ethical behavior by the judiciary, and that is what we have.

Thank you.

Mr. COBLE. Judge, I think if you answer favorably, you are self-serving. But I would be happy to hear from you nonetheless.

Judge OSTEEN. It would be, but except for one thing, Mr. Chairman, which may not be known generally. That is, in addition to the innate ability in what I think is a tremendous ethical standard built by judges themselves. I can speak relative to the Code of Conduct Committee for just a moment.

I have been a Member of that Committee for 6½ years now, and every Member of the Committee reviews every single inquiry that is made of judges. During that time, there have been judges—I believe that it would be an accurate figure to say, in 6½ years, about 4 to 500 inquiries, formal inquiries, of the Committee by judges themselves asking, is this type of conduct in keeping with the code of conduct?

Our Committee has no authority to police. It has no authority to demand that anybody do anything. We simply advise. And I am happy to say that I am not aware of a single incident in which the Code of Conduct Committee has issued an opinion which the judges haven't complied with. And some of them are very close questions.

And I don't mean their questions indicate that they are trying to go out on the cutting edge to plow new ground, but in the framework of relatively few very strict canons of conduct, judges are trying to comply with what is required of us, not only from the standpoint of what actually is required, but from the perception of what is required also.

Mr. COBLE. Thank you, Your Honor.

Even though the red light is not on because of a faulty machine, my time has expired. The gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman.

Judge Osteen, I have—I don't know if it is a comparable experience, but I have the misfortune of being the Ranking Democrat on the House Committee on Standards of Official Conduct, the ethics committee. And so I get involved in this miserable self-regulatory process. And in some ways, at least in the Federal judiciary, you are dealing with a large number of people all over the country that you don't have direct contact with on a regular basis. Here it is a little more intimate, and it is a tough job.

And so I commend you for being a part of that process, because I don't—I am not sure what the better alternative is than self-regulation and this process, but it is never comfortable to have to judge—make judgments about your peers.

First, this question of financial disclosure. There has been a theme from one or more of the witnesses that the financial disclosure obligations on judges are there, but they are not always enforced. We have the same—we have a situation here where Members and staff have to file financial disclosure forms; and from the time in May, when those forms are due, for the next number of months, both the staff of the Committee that I serve on, and even people sent over from GAO, systematically go through each financial disclosure form and compare it with previous forms to see what comes out from that, at least that facial review of the forms filed and whether there is the need for changes or corrections, or indications of improprieties, violating outside earnings limitations, things like that.

What is the process for some check on whether or not the forms filed, at least on their face, comply with the obligations to make financial disclosure?

Judge OSTEEN. Congressman, I can speak personally from that because I file a financial statement with the appropriate places each year that we have had one. Practically each year I received a letter back from the Members of the Committee saying, Would you explain this, would you explain that. And it is pretty much in detail.

Now, I believe that I tried to explain, when I filed the statement, what my situation was, but I can assure you that it is not taken for granted by that Committee.

Now, I am not on that Committee, the financial disclosure, but I file my statement annually—and not only I, but my secretary will vouch for this, too—but practically every year we get a return saying, Please explain this.

Mr. BERMAN. You are saying there is a systematic process of review of the financial disclosure forms?

Judge OSTEEN. I can say every single one filed by district judges and, I assume, every other judge is reviewed by someone outside the circuit in which I reside. For instance, mine would not be handled by someone in the Fourth Circuit but somewhere else. Somewhere down the line it is reviewed by someone on the Committee.

Mr. BERMAN. There are limitations, of course, to that process. A person who willfully does not include or perhaps even inadvertently doesn't include something that he or she was required to include, that kind of review will not—will probably not detect that omission.

Judge OSTEEN. Oh, no. It would not.

Mr. BERMAN. I think, Mr. Kendall—I think it is Mr. Kendall who mentioned, are these educational seminars? We are required to report when we go on one of these seminars that they have some connection with official duties.

Judge OSTEEN. You wouldn't call it a "junket," would you?

Mr. BERMAN. We call them "fact-finding missions," but not crusades. But I take it there is an obligation—the implication—an obligation to report those seminars.

Judge OSTEEN. The value of the reimbursement and the value of the seminar itself.

Mr. BERMAN. What happens to the 19 judges, if that is accurate—the number isn't that important—who didn't report that?

Judge OSTEEN. Well, my guess is—and I don't know what has happened to those because I can't speak personally. The ones—whichever one you may select, I know of no particular number of judges who did not report that.

I do know that in the beginning, there was some question about whether and how to report that, and some judges did not until it was called to their attention by Members of the Committee. And the AO also sent out information saying essentially that this kind of thing must be reported on the form. So what has happened to specific people.

I don't know the answer to that.

Mr. BERMAN. Just on that issue, because my time has expired, tell me what—elaborate on this notion that 19 didn't file. How do you know?

Mr. KENDALL. I know that about 12 percent of the judges who were on a list prepared by FREE——

Mr. COBLE. Mr. Kendall pull that mike a little closer. My hearing is failing in my old age.

Mr. KENDALL. Community Rights Counsel obtained a list that FREE put up as part of their invitation to new judges, which included all the judges who attended their programs between 1992 and 1996. We then compared that against the Federal judges' disclosure forms for those years and found that 13 of those 109 judges hadn't reported it. It is like 17 or 18 didn't report it originally, and then four or five reported it after this issue came to light.

And the financial disclosure office sent this letter to every judge saying, If you didn't disclose it, you really have to now. So four or five did disclose it afterwards; 13 never did despite that warning.

So there is a problem of nondisclosure. Not every judge—the disclosure requirement is clear, and I think the vast majority of judges understand it and comply with it. But a considerable minority do not. And, second of all, there is a problem of judges not disclosing everything that financial disclosure law requires. As Judge Osteen just mentioned, disclosure law requires that you disclose the value of the gift, and judges are almost never doing that.

Mr. BERMAN. I know my time is up, but you refer to it as a "gift." we do not refer to—I will be personal here.

One of the most valuable experiences I have in Congress is participating in Aspen Institute seminars on different subjects. They are ongoing seminars that occur yearly and usually at a nice place. Aspen Institute funds them, and we bring in top experts from around the country and the world. We don't call that a "gift." I mean, we call that a trip connected with our official business for which we are reimbursed; and we disclose who funds it and the value of what we were reimbursed, but we don't call it a "gift.".

Mr. KENDALL. As I understand the judiciary's regulation that implements the Ethics Reform Act, tuition, room and board, things paid directly by an organization like FREE are considered gifts, and those must be disclosed and the value of those must be estimated.

Mr. COBLE. Thank you, Howard.

We are going to have a second round, folks. I think this is an issue that needs to be thoroughly examined. We have been joined by the distinguished gentleman from the Roanoke Valley of Virginia. Let me recognize Mr. Jenkins first since he was here prior to your arrival.

Mr. Jenkins.

He also, by the way, was a judge in his earlier life.

Mr. JENKINS. Let me ask a question.

Judge Osteen, you mentioned a number of cases, 560,000 cases over what, a 2- or 3-year period?

Judge OSTEEN. What that is, Congressman, is in 1999 there were 264,000 cases filed in Federal jurisdictions throughout the United States. It ordinarily takes about 2 years for an average case to run its course in the Federal system. So since we were talking about taking 2 years to run its course, I have simply taken two averages, 264,000 twice, to come with 520,000 cases. That is 264,000 each year.

Mr. JENKINS. All right. And the fractional amount, or number that you mentioned, was 17 ten-thousandths?

Judge OSTEEN. Yes, sir.

Mr. JENKINS. Is that the number of cases in which allegations of impropriety were made?

Judge OSTEEN. Yes.

Mr. JENKINS. In the number of cases, how many is that?

Judge OSTEEN. Number of cases, it is less than 100. The originator of the information to the public was Joe Stevens of the Kansas City Star, who found what he considered to be 57 questionable cases. Mr. Kendall and the CRC found an additional 17 cases and reported those. But in the interest of putting the whole matter on the table, I added to that ten cases from New York, seven cases from Minneapolis and four cases from all over, making almost 100—or a little less than 100, but I rounded it off to 100.

Mr. JENKINS. In those cases where there were allegations of wrongdoing, do you have any information on the number where there was a conclusion at the outcome of that case that there was found to be wrongdoing?

Judge OSTEEN. No, sir. I don't know of any that were found. Of that 100—let me be a little more specific on that. The 100, there were a number of cases in which a judge to whom the case was originally signed—assigned, simply signed off on a motion to extend time for answering the complaint or simply signed off on a matter of setting a discovery plan—nothing of substance at that point.

Another area is that there were some cases in which it was later determined that the allegation had been made from the financial disclosure list rather than the recusal list, and the financial disclosure list is simply not current. It is once a year. A recusal list of a judge is a continuing and everyday matter. So some allegations were made from last year's financial statement, and the judge had sold the stock and was no longer in conflict.

In some of them, there were cases in which a spouse had purchased stock without the notice of the judge. And in some cases, a judge had purchased stock through a broker and had simply not recused—several reasons for that. One, a case can be started in the name of XYZ plaintiff or defendant. During the course of litigation, XYZ can be purchased by another entity or purchase another entity, which could cause at that point a conflict if that purchase or purchasing entity becomes known. But if it is not known to the judge, then the judge has no way of knowing that he would be in a conflicted position.

That is a long way about saying that there are many reasons for why, and there are some in which a judge did not recuse for whatever reason, I don't know, but that is very few. I have found no appellate cases which indicate that there was a wrong decision substantively made by any judge who was even alleged to be in that number of less than 100, which in fact, in my opinion, is considerably smaller than that for purposes of serious consequences.

Mr. JENKINS. We have to conclude from these figures that those are going very well, unless there is a total lack of reporting of incidents and allegations of wrongdoing?

Judge OSTEEN. I cannot reach any other conclusion with that. I think it is so minute that it is—there are going to be some human errors anytime, anywhere; and the judiciary has done a good job in policing itself. The judiciary is the one that came up with the recusal idea, in 1978, I guess it was.

Mr. JENKINS. Let me ask you, are all Federal judges under the same standard or were there statutes or rules promulgated that placed a different standard on Federal judges? Sometimes in the State courts, the supreme court will issue a regulation that will grandfather judges in and allow ownership of certain properties for those who are already on the bench. But in the future, they will be prohibited.

Judge OSTEEN. No grandfather clause.

Mr. JENKINS. There is no similar double standard for Federal judges?

Judge OSTEEN. There is no double standard. And I am not sure I understood your question correctly. But if I did, you said, are all judges subject to this code of conduct, and the answer to that is no. Supreme Court justices are not.

Mr. JENKINS. Thank you very much, Judge.

Mr. COBLE. Thank you, Mr. Jenkins.

The gentleman from Virginia.

Mr. GOODLATTE. I have no questions.

Mr. COBLE. Let us start a second round. I think this warrants a second round.

Mr. Kendall, every group needs watchdogs. And I would classify you as a watchdog and that is a compliment. I never believed that the Federal judiciary ought to be fed with a preferential spoon while the rest of us are fed more rigidly, or less flexibly or more inflexibly; but I don't think they should be penalized, conversely, because they happen to be Federal judges.

But let me put a hypothetical to you, if I may; and hypothetical questions, I know, can be troublesome. And Judge Osteen, I want to put this same question to each of you. And the question is, what constitutes a financial conflict of interest for a judge?

As you pointed out, Your Honor, you said there are some close calls. If a judge owns an IRA, mutual fund or 401(k) which contains hundreds of stocks, including that of XYZ corporation, should that judge then be compelled to recuse himself or herself from adjudicating a dispute between XYZ and another litigant?

What do you say?

Mr. KENDALL. The answer is absolutely not. And I think it is absolutely clear under the financial conflict rules that ownership of broad-based mutual funds that include stocks in corporations does not constitute a financial conflict. And that is why I think we can be so demanding about judges avoiding actual financial conflicts, because the judiciary and judges can own stock in corporations around the country through the simple—through buying mutual funds instead of buying individual shares in companies.

I think I need to say something in response to the last answer Judge Osteen gave. I don't think it is at all fair to compare stock conflicts found in Kansas City with the entire docket of the Federal judiciary. The fact of the matter is that the Kansas City Star found that more than 50 percent of the judges that they examined had

ruled in at least one matter in which they own stock or in which they had a disqualifying financial conflict.

In our Community Rights Counsel study, we found that in a single year, looking only at decisions on the merits issued by Federal appellate judges, more than 5 percent of our Federal judges in a single year ruled in a case in which they had a disqualifying financial conflict. If that is perfection or close to it, I need a new dictionary.

And, again, I think we need to go back to the comparison between how stock conflicts are treated through the Department of Justice and the judiciary. Again, in a single case of a stock conflict with the judiciary, the line of attorneys at the Department of Justice would be thrown out the door. Again, I don't think there is any mechanism in place for policing stock conflicts with judges in terms of consequences for doing so.

Mr. COBLE. Thank you.

Your Honor, do you want to be heard?

Does anybody else want to be heard?

Judge OSTEEN. Just as to your question about mutual funds, and I agree with Mr. Kendall on the ownership.

Mr. COBLE. I think that is a fair answer.

Let me put this to you: One thing that was mentioned in the Kansas City instance—I believe I am right about this—most of the judges who got into trouble with financial disclosure issues were district court judges, as opposed to appellate court judges. I think that is right. Is that right?

Mr. KENDALL. The study was of two in Kansas City, one in Oregon and one in Pennsylvania.

Mr. COBLE. Is this disparity because there is a lack of unified rules for both? I would assume that is not the case, Judge.

Judge OSTEEN. Unified rule for what?

Mr. COBLE. The Kansas City case, most of the judges who were involved with, quote, violating the rule—maybe not in quote—were district court judges, not appellate court judges.

Is that just because they emphasized district court judges?

Judge OSTEEN. I think that is what they did, they reviewed the district court judges.

And I might add one thing. That was a 6½-year study; not a single year or 2 years, but Mr. Stevens reviewed 6½ years over that period.

Mr. COBLE. Mr. Remington, the 1993 National Commission which studied the issue of judicial discipline recommended that committee appointed by circuit counsel should, for the evaluation of serious complaints, be partially comprised of nonjudges. Elaborate, if you will, how this would work, how this will be executed; and would such a change engender intense resentment among judges comprising the ability—compromising the ability of the committees to perform their duties? What do you say to that?

Mr. REMINGTON. That is a good question, and I may defer to Professor Hellman on this because he is more experienced in actual bench and bar integration.

Mr. COBLE. I should have put that question to each of you.

Mr. REMINGTON. But the Commission's recommendation, you accurately described it, would allow the circuit counsel, presumably

through the chief judge, to appoint respected members of the bar and informed citizens to help out in this process, either in the formal dispute discipline decision-making or in the informal process involved in what do you do with a disabled judge or a senile judge or can we—how do we handle this?

It would be discretionary. It has not been, to the best of my knowledge, implemented in any of the circuits, even the circuits that have taken a lead on integration of the bar to assist the judges.

The exception to that rule would probably be the Ninth Circuit where Professor Hellman has most of his experience. There must be some reason that this was not implemented by any of the circuits, but I don't personally believe that there would be intense resentment of judges to members of the bar.

In conclusion, Mr. Chairman, it is a good question. I think that there probably is some sort of subliminal feeling amongst the judges that they can decide these things on their own, either informally or formally—I thank you very much, to the bar and informed lay persons, we simply don't need you in this process—but it is not intense resentment.

Mr. COBLE. Professor?

Mr. HELLMAN. I think one of the most important findings of the Federal Judicial Center study finding that was carried out for the National Commission was its study of the informal processes; and I think this is an impartial answer, Mr. Chairman, to your question because one of the striking findings of the study was how important these informal processes were to the correction of problems involving misconduct or disability among Federal judges. And at the same time, one of the core relative findings was that success was dependent in part on the existence of the statute.

But this is something that the chief judge typically does. It is very hard to see how the chief judge could involve anyone from outside the court, perhaps even—it may even be difficult to involve other judges, because one of the key things the chief judge has as a bargaining chip really is the prospect of keeping the matter from going public.

There is, in fact, a very poignant vignette in the Center study. The chief judge was trying to persuade a particular judge to retire, and there is no clue as to what the problem was, but probably some kind of disability, and the judge was resisting retirement, but the judge's spouse knew about section 372(c). And the spouse thought that the worst thing that could happen would be a 372(c) complaint at the end of the judge's illustrious career. So in the end, that prevailed. But the prospect of any sort of sharing that information outside the closest family of the court would have destroyed the prospect of that successful conclusion.

So I think that is a partial answer as to why the process has been kept as close as it has been.

Mr. REMINGTON. Mr. Chairman, could I just add that there is a more recent illustration, and I am not at liberty to divulge the judge's name and I wasn't at all involved, but it did involve the chief judge of the circuit inviting the spouse to the courtroom to sit and watch the other spouse in action as a judge; and it resulted in a decision, an informal decision by the spouse that the judge

should not hear any more cases. So it did involve somebody not involved in the judicial family. And that postdated the famous Judicial Center study of 1993 and 1994.

Mr. COBLE. Thank you, sir.

I am now the victim of the red light, so I will recognize the gentleman from California.

Mr. BERMAN. First, Professor Hellman, your point on recused judges, on the question of whether or not to go en banc wasn't that they are now voting on the en banc matter; it is, if you require an absolute majority, they in effect become a no vote.

Mr. HELLMAN. That is exactly right. It is sort of like comparing that for every recused judge that is in fact automatically counted as a no vote, which means that the panel decision is more likely to stand and that is affecting the outcome of the case. And a recused judge shouldn't affect the outcome of the case.

Mr. BERMAN. Do you think this is now a matter that the Congress should address?

Mr. HELLMAN. It may be the sort of thing that could be handled by the rules amendment process. There is wide power in the rules process to amend the Federal Rules of Appellate Procedure. Probably it could be done.

As far as I am aware, the Appellate Rules Committee has never exhibited the slightest interest in this problem. It has been known for years and years. The Supreme Court declined the opportunity when it was presented squarely a few years ago to resolve it. So nobody else is going to do anything about it, and this is Congress' statute.

It is an ambiguity in the statute. It is a legitimate ambiguity. The circuits are evenly divided, as they can be, as to how to interpret it. And this is a function of an oversight hearing to find out these little problems that nobody thought of when the statute was written; and it is something you can, I think, deal with.

But thank you for the question.

Mr. BERMAN. In your introduction, the Chairman mentioned that you are in charge of a committee evaluating the Ninth Circuit.

Mr. HELLMAN. I was a Member of the committee, not just a foot soldier.

Mr. BERMAN. This wasn't Chief Justice Rehnquist saying, take a look at the Ninth Circuit. What kind of a committee was this?

Mr. HELLMAN. This was a committee that was appointed by Chief Judge Hug of Reno, NV, after the commission appointed by Chief Justice Rehnquist and chaired by Justice Byron White reported.

The White Commission, as you are well aware——

Mr. BERMAN. So this was about the split?

Mr. HELLMAN. It was not about the split. I have to be careful here because as a Member of the committee which has now completed its report, I want to be careful in my description.

But the chief judge was careful in his charge. And Judge Thompson of San Diego was very careful in his directions to us to say we were not looking at split issues.

Mr. BERMAN. What were you looking at?

Mr. HELLMAN. Whether the Court of Appeals was doing its job.

Mr. BERMAN. Presumably, if the conclusion is that it wasn't functioning that well because of case load and size and distance, then maybe people would take what you find and go from there, rather than going to the ultimate question?

Mr. HELLMAN. Yes. We were not addressing the legislative issues. That, of course, belongs with Congress.

Mr. BERMAN. That probably isn't the purpose of this hearing, but it is an issue that I have interest in.

But Advisory Opinion 67, Mr. Kendall, do you think particularly that part of it—I don't know what it all says, but this whole issue—where it says it is improper for a judge to participate in a seminar if the source or sponsor of—if the sponsor of the seminar or the source of funding is a litigant and if it is a topic to be in some manner related to the litigation.

Is that an appropriate standard? Is your argument with Advisory Opinion 67 or how it is being interpreted?

Mr. KENDALL. I think it is both. My argument is with both Advisory Opinion 67 generally and how it is being interpreted.

I think one of the biggest problems with Advisory Opinion 67 is that it gives an ambiguous and complex answer to what I think, when judges should take a gift in relation to a continuing education program. The judiciary, as far as I know, has never defined many of the critical terms, such as involved in a litigation, what is the subject matter of the litigation with respect to Advisory Opinion 67? And as I understand their testimony today, even the source of funding, which I thought was pretty clear, is now more ambiguous than it was.

I think a second problem with Advisory Opinion 67 is that it requires, at least as I read it, the collection of a whole lot of information about who each organization's funding sources are, what litigation activities those funding sources are involved in, et cetera, and what the program schedule is, et cetera; and doesn't help the judiciary at all in collecting—or individual judges at all in collecting that information.

And so it is burdensome to place the burden on judges to collect and ascertain all that information before attending one of these seminars.

Mr. BERMAN. Let me just—I realize you haven't finished answering that question, but I don't know how you are going to. Let us go to the basic issues here. I will just throw out a few things and get your expertise.

Is it wrong for judges, do you think it—is your issue that they should never be going to these seminars, that they should not be going to seminars that are not balanced in their perspective, that they should not be going to seminars that have any form of private funding? Which means there will be no seminars, because my guess is the line item for Congress to appropriate money for seminars for judges will not last a long time, and the judges will probably have it put into the pay. But in other words, I want to get a fix on what the concern is.

Mr. KENDALL. I think the concern is that corporations and foundations that have an interest in Federal court litigation are funding continuing legal education programs for judges; and I don't quite know why we are allowing them to do so. The combined

budgets of FREE, the Law and Economics Center—every group that is funding these programs is under $10 million, probably far under $10 million. It would be a very small problem to solve.

And more fundamentally——

Mr. BERMAN. What is a small problem to solve?

Mr. KENDALL. If the budget for continuing legal education is necessary, at least under existing practices for Federal judges, if the taxpayers paid for every seminar that any Federal judge attended, that line item in the budget would be under $10 million—probably be under $2 million by my calculations.

But I think just more fundamentally, we have to disabuse ourselves of the notion that judges have some God-given or constitutional right to accept a gift worth thousands of dollars, given to them solely because of their position as a public servant.

I think, similarly, we have to disabuse ourselves of the notion that corporations and foundations have some sort of right to pay for the continuing legal education for judges. Certainly, again going back to the comparison to U.S. Attorneys, Department of Justice officials, other public servants involved in litigation, they have absolutely no ability to accept gifts in association with this. There is an absolute bar on gifts associated with educational seminars for other public servants involved in litigation.

So maybe there should be a different standard for judges. Maybe there should be some exceptions for seminars done by institutions of higher education, seminars done by bar associations. But I think we need to look at this from the perspective of a litigant who is fighting a corporation in a tort claim and finds out that the corporation has, even in small part, funded a trip, seminar, vacation, junket, whatever you call it, for the judge presiding over their case. And I think if you look at it from that perspective, which I think is the only perspective you can look at it from if you are worried about the public's confidence in the judiciary, you come up with a pretty rigid standard.

Maybe you might have some exception that judges can take gifts by certain universities and bar associations, but you will define those exceptions pretty narrowly.

Mr. BERMAN. I think you make a very legitimate point.

Now, life is filled with certain things which at least have the appearance of unfairness. The judge in the small town who socializes at the club or wherever with the top lawyers from the town, and the outside lawyer comes in representing some litigant and how he is—there are—I mean, it is—as much as I would like to see all the judges up in a vacuum to chase and never deal with the sort of the social and personal and political and financial aspects of life.

But—maybe one can say we understand those, but maybe this is a little different, and we should look at it.

Mr. KENDALL. Well, I think the difference is simply the size of the gift. I mean, we are talking a gift worth between $1 and $7,000 for each of these trips.

Mr. BERMAN. We don't call that a "gift."

Mr. KENDALL. No one is arguing that judges should be hermits. Nobody is burning books. Nobody is suggesting that judges should be in any way limited in what they read, what programs even they go to.

As Judge Osteen says in his written testimony, judges can go to any program they want to as long as they pay their own way. I really have no problem with the Federal Government providing money and judges going to any seminar they want, and there is some sort of budget.

Mr. BERMAN. What if it is a big nonprofit foundation that decides the education and seminar process for judges is something in the national interest, and we are going to put together—the Ford Foundation decides—we think everyone understands law, economics and environmental considerations to a level that you really just don't get in the handling of a case—I am getting a little long here, but I mean, would that make a difference perhaps if it was——

Mr. KENDALL. I think there are a lot of ways of solving the problem. I know a number of people have a lot of ideas about doing it. So I think there is a lot of disagreement about how, precisely, you should solve this problem. But I think that to start is by recognizing there is a problem.

Mr. COBLE. I thank the gentleman.

The gentleman from Tennessee.

Mr. JENKINS. I don't have any additional questions.

Mr. COBLE. This has been a good hearing, in my opinion, and it will not be put upon the shelf to collect dust, I assure you of that. Let me fire one more round.

Hypothetically, again, I am a grieved litigant and I don't trust Judge Osteen—strike that. I don't trust Judge Doe, and I say, I am going to file a petition asking that Judge Doe recuse himself from this case. My petition is subsequently dismissed. I am not told why.

I have no reason—can't imagine why it was dismissed. I think it was a meritorious petition. I submitted my facts, and it is summarily dismissed, and I am told to get lost.

Now, Professor Hellman, and the others as well, how often does that happen?

Mr. HELLMAN. Well, I think that first there are two separate processes involved here. There is the process of recusal in an individual case, and that—I am not sure what the usual practice is. Sometimes you will get an opinion from a judge explaining why he or she has not recused him or herself.

There is a famous opinion by then-Justice Rehnquist explaining at length why he was not recusing himself despite a prior contact with some of the issues in a case. But I am sure many of them are not—are not explained.

Now, that kind of situation focused on a particular case would not, I think, come within the Judicial Discipline Act, because one of the exceptions of the act is for challenges involving particular rulings in particular cases. And so, in that situation, the only redress would be to take an appeal.

Now, if there is a pattern of failure to recuse, that is arguably something that could be the subject of a complaint. And here we get, I think, into a somewhat broader question than you raised, Mr. Chairman, which is the importance of an explanation when the judiciary acts. It cuts across almost everything that judges do, and especially things that judges do that are in a process that is invisible.

If an individual files a grievance, it goes into the system. He never has a chance—and this is understandable, but he doesn't have a chance to argue it and present his case orally, as is typically done on the case on the merits. And all he gets is a conclusory form order. Then I think he understandably feels aggrieved once again that no one has taken his case seriously.

So one of the most important recommendations, I think, of the National Commission—and Mr. Remington will correct me if I am wrong on this—was that the chief judges should be very rigorous in giving explanations when they reject a complaint.

Mr. COBLE. I concur. I think many people become disarmed when they have to go to court. A traffic ticket, for example, my gosh, I hate to go there. I have never been to court before. And I think this—this answer to my question addresses the problem.

I think if a person is summarily dismissed and not told why, I can see why he is going to be sore. Anywhere—does anybody else want to be heard on this?

Mr. REMINGTON. I want to agree with Professor Hellman about a large number of those people filing judicial discipline complaints. And as Professor Hellman indicated, that is not appropriate.

I would like to add two points about legislative proposals that are in my statement that parallel Professor Hellman's idea about the recusal. I sat at this counsel table in 1985 when Judge Claiborne was impeached, and I remember Chairman Sensenbrenner's resolution and Members of Congress were amazed that judges could continue to accrue toward retirement on the Rule of 80, and they were amazed that judges could continue to get assigned cases even when they were in jail.

And I know that this is not important. These are not issues we have seen ever since, fortunately. But these are two little amendments that the Commission recommended. They have never been taken up, and I would recommend them for your consideration.

Nonetheless, I think the public deserves some semblance of accountability in the system, and we ought not create economic incentives for incarcerated judges to sit on the bench.

Mr. COBLE. I concur. They should have more a feeling of east and comfort rather than alarm. And maybe it is up to all of us jointly and severally to take care of that. Howard, anymore questions?

Mr. BERMAN. Judge Osteen, you talked about recusal. Someone else talked about Iowa where you put the recusal lists on the Web site and insist that the attorneys for the litigants make reference to that.

Is there some Federal obligation to prepare your own recusal list? I don't know, whoever wants to. In other words, do you have a recusal list?

Judge OSTEEN. Yes, sir, I do.

Mr. BERMAN. Do you have it because you have to have it?

Judge OSTEEN. I have to have it because I have to make a decision as to whether or not I can handle a case or not.

Mr. BERMAN. You can do it case by case?

Judge OSTEEN. You can do it case by case. But I can't do it unless I have a current list of my stock holdings. So I have to keep that current in order for me to comply with the requirements.

Mr. BERMAN. I can remember mine in my head.

Judge OSTEEN. Mine is not much more than that, if at all. But it does help if you have a spouse who may be buying stock. You get that list current.

Mr. BERMAN. Under the Federal Rules, the judges have to have such a list; or is that your decision?

Judge OSTEEN. I don't know of any list that is required by rule. But I do know that there is no way I can do it without a list. And I also know that there have been—the AO has come out with a great deal of help on computer-assisted information to help prepare lists.

Mr. BERMAN. It is not just an issue, then, of putting a list on a district court Web site. It is an issue of whether or not to require a recusal list, although I think the financial disclosure form——

Judge OSTEEN. Financial disclosure form is not a current list because it is a yearly list.

Mr. COBLE. Anything further?

Ms. Hart, would you like to be heard?

We very much appreciate the contribution that the witnesses have extended today. We thank you very much for that. The Subcommittee is appreciative.

Now, we have accepted or made part of the record information from third parties who are very concerned about this issue and those matters will be made a part of our record.

Mr. COBLE. This concludes the oversight hearing on the operations of Federal judicial misconduct statutes. The record will remain open for 1 week, so if you all have additional information to submit, feel free to do so.

Thank you for your cooperation. And the Subcommittee stands adjourned.

[Whereupon, at 12 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Clarification of the Record
The Honorable Howard Coble
Chairman, Subcommittee on Courts, the Internet, and Intellectual Property
Oversight Hearing on the Operations of Federal Judicial Misconduct Statutes
November 29, 2001

As Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, I wish to note for the record that three of the witnesses (Mike Remington, Arthur Hellman, and Doug Kendall) circulated rough drafts of their testimony in advance of the hearing. This was done in an effort to assist all witnesses and Subcommittee staff in their preparations.

Judge Osteen based a small portion of his testimony on two provisions set forth in the rough draft initially circulated by Doug Kendall. These provisions referenced Mr. Kendall's belief that federal judges are duty-bound to avoid conflicts "being honored in the breach." I wish the record to reflect that the final draft of Mr. Kendall's testimony did not contain these references. Further, Mr. Kendall made these editorial changes without knowing that Judge Osteen's statement – received later than those of the other three witnesses – would contain comments critical of these provisions.

Statement of

Mark F. Grady
Dean, George Mason University School of Law
Chairman, George Mason Law & Economics Center

and

F.H. Buckley
Professor, George Mason University School of Law
Director, George Mason Law & Economics Center

House Committee on the Judiciary
Subcommittee on Courts,
the Internet, and Intellectual Property

Oversight Hearing on Operation of Federal Judicial Misconduct and Recusal Statutes
November 29, 2001

December 3, 2001

We are the chairman and director of the George Mason University Law & Economics center. Dean Grady is a past director of the American Law and Economics Association and for the last four and a half years has been the dean of George Mason School of Law. Professor Buckley has been a professor at George Mason School of Law since 1989 and a visiting professor at the Sorbonne from 1999-2001. Our curricula vitae are attached.

The George Mason Law & Economics Center is an integral part of George Mason School of Law, which is a Virginia state law school and a tier-one law school. On objective measures of scholarship, our law school ranks in the top 25 law schools in the country.

The LEC has been offering programs for judges since 1976, and more than 600 judges have taken them. LEC programs and instructors are selected solely by its director and chairman. The programs are philosophical and not political; they are theoretical and not tendentious. Anyone looking at our programs will be struck by the range and quality of our offerings. We are not aware of a comparable program offered by any other law school. We describe our programs in detail in our web site at www.law.gmu.edu/lawecon/, with detailed reading lists and links to instructor web pages.

Our programs are not partisan, and we have won praise from judges from very different backgrounds. In 25 years, we are not aware of any judge who has complained in any way about the content of our programs. We append letters of support from various judges and law deans.

In a typical LEC institute, a group of about 20 judges attends 21 hours of lectures over a six-day period, with an average of 500 pages of difficult readings. We have three hours of lectures on most days, and six hours on one day. The judges are asked to have all the readings done before each class and to attend each class prepared to discuss the materials.

Our first program in 2002 is on Aristotle's Nicomachean Ethics. Lecturers here include Harvard's Harvey Mansfield and MacArthur Prize winner Michael Ignatieff. The second program studies and celebrates American values, and is taught by noted academics. The lectures include a look at America in Poetry taught by a major American poet and an examination of the idea of the Frontier. The third program features readings from the Founders taught by the A-list of American historians. The fourth program is on the economics or private law, and features lectures by noted academics at the law schools at U. Va., Chicago, and Yale. After six hours of microeconomics, we look at how law and economics can be applied in contract, property, and tort law. The fifth program on antitrust economics begins with six hours of pure microeconomics and features lectures by two Nobel laureates. Our sixth program is on science and features one of this country's best philosophers, John Searle, as well as noted scientists and an economist from Harvard Law School. Finally, we have two shorter programs on Shakespeare and Jane Jacobs. We have never offered programs on the environment.

We seek hotels that provide retreat-like settings, in which judges will feel removed from their work and in which the burden of reading 500 pages of materials will not seem burdensome. Most judges come to our programs having read only part of the materials, and catch up on the rest during breaks in the program.

We offer our programs off campus. Unlike many universities, George Mason University does not have its own retreat facilities, and programs in the Washington area would be more expensive than those at the locales we employ. The hotels we use are comparable to those used for other judicial education programs. Apart from the lectures and meals there are no other activities. We do not pay for spouses.

The LEC is advised by a Judicial Advisory Board composed of eminent judges, which has approved our policies. Advisory Opinion 67 asks judges to inquire into sources of funding only if "there is a reasonable question concerning the propriety of participation." We are advised that such questions do not arise when the program is an academic one sponsored by a law school.

The LEC does not disclose the names of its donors and has not done so for eight years. This is done to protect the integrity of our programs. If judges do not know the identity of our supporters, it is difficult to see how the judges can assist them. Our policy therefore resembles a blind trust, which reduces the problems of conflicts of interest. We are advised that our policy is in compliance with Advisory Opinion 67.

After one of our programs, one judge wrote "As a student in two ... seminars I can affirm that the instruction was far more intense than the Florida sun. For lifting the veil on regression analyses, and for advancing both learning and collegial relationships among federal judges across the country, my enduring appreciation." The judge was Justice Ruth Bader Ginsburg.

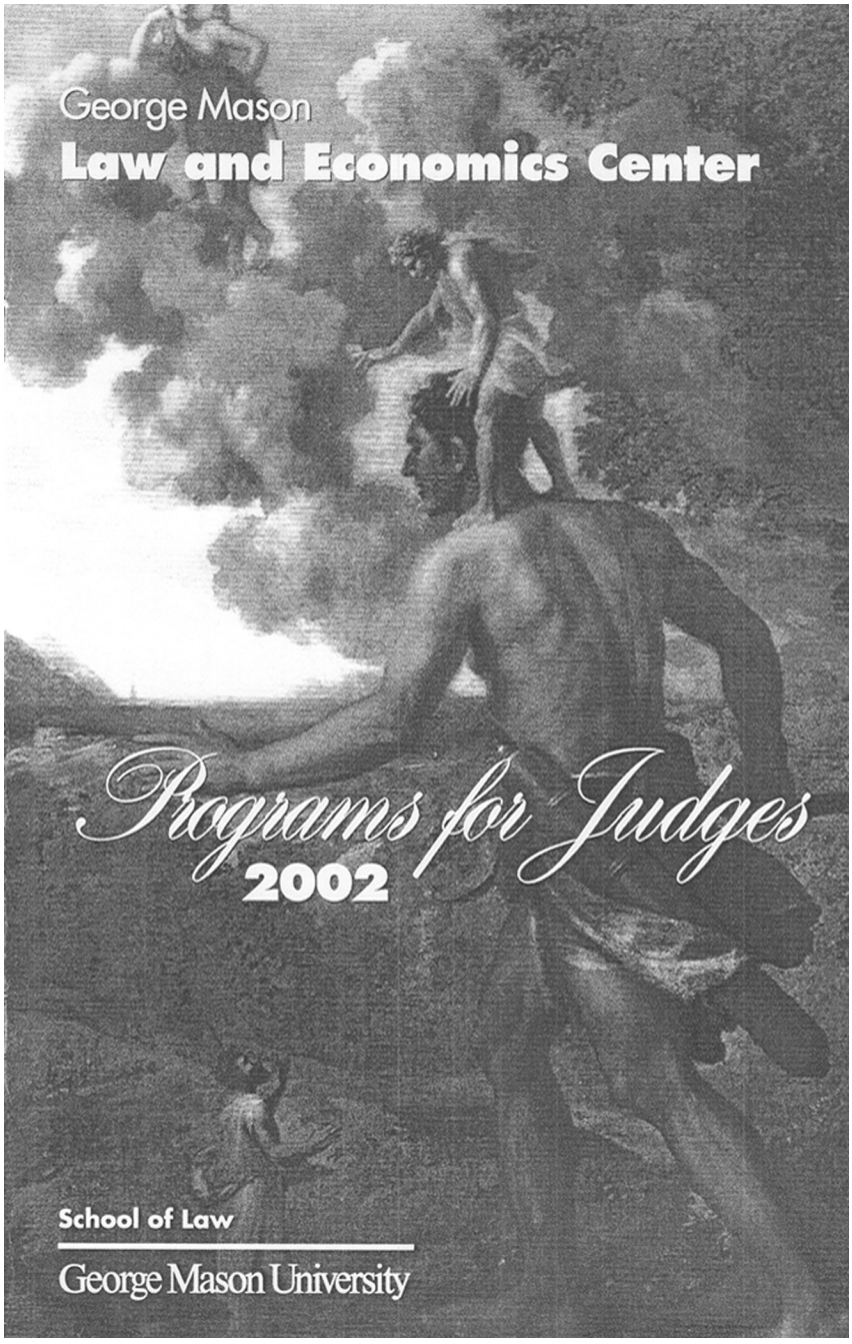
In his written testimony Douglas Kendall stated:

> During an interview for 20/20, the Dean of the George Mason Law School frankly admitted that LEC is "out to influence minds . . . If court cases are changed, then that is something we are proud of as well."

Mr. Kendall described this as "brazen." The quotation in question was taken out of context. In the interview Dean Grady made clear that the LEC seeks to influence participants only in the sense that any university seeks to influence its students; otherwise, there would be little reason for a student to seek a university education.

In response to a question at the hearing Mr. Kendall said, "I'm not suggesting I want to police what judges read. I don't want to burn books." Programs run by "certain universities" would be acceptable, he said. We see no reason why George Mason University should be excluded from Mr. Kendall's list of approved universities.

Encl. C.v. of Dean Mark F. Grady
C.v. of Professor F.H. Buckley
Institutes 2002 brochure
Speech by Chief Justice William H. Rehnquist
Speech by Judge A. Raymond Randolph
Letter from Judge Judith Barzilay, Nov. 15, 2001
Letter from Judge C. Lynwood Smith, Nov. 21, 2001
Letter from Judge Robert Bell, Nov. 14, 2001
Letter from Richard W. Goldberg, Nov. 29, 2001
Letter from Judge Thomas Eisele, Nov. 9, 2001
Letter from Judge Thomas Griesa, Nov. 14, 2001
Letter from Judge Clarence Newcomer, Nov. 14, 2001
Letter from Judge Arthur Spiegel, Nov. 16, 2001
Letter from Magistrate Judge Joel Feldman, Nov. 9, 2001
Letter of Judge Thomas J. McAvoy, Nov. 23, 2001
Letter of Judge John Feikens, Nov. 20, 2001
Letter from Dean Anthony Kronman, Yale Law School, Nov. 13, 2001
Letter from Dean Douglas Kmiec, Catholic University Law School, Nov. 13, 2001
Wall Street Journal editorial, Oct. 24, 2000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Institutes for Judges 2002

Aristotle and the Virtues
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The Idea of America
June 3-9, 2002

The Forging of a Nation
June 10-16, 2002

The Economics of Private Law
September 20-26, 2002

The Economics of Public Law
September 27 to October 3, 2002

Science in the Courts
December 6-12, 2002

Academic Colloquia

Shakespeare on Liberty: The Roman Plays
March 21-24, 2002

The Unheavenly City:
Jane Jacob's Death and Life of Great American Cities at 40
May 16-19, 2002

Cover: Blind Orion Searching for the Rising Sun, Nicolas Poussin 1658

Instructors Jean Elshtain, Clifford Orwin, Michael Ignatieff and Roger Scruton with judges and LEC staff, Santa Fe, NM, June 2001

A Record of Academic Excellence

In 2001, the George Mason Law & Economics Center expanded the size and scope of its offerings, with lectures by some of the leading academics in economics, philosophy and history.

For seven weeks a year, the LEC conducts *one of the world's premier educational programs.*

Founded in 1974, the LEC offered its first institute for judges in 1976. Since then, more than 600 judges have taken one or more of its institutes. This number includes 318 active judges. Two members of the Supreme Court and 41 active members of a Court of Appeals have taken at least one institute.

In 2001 the LEC for the first time invited senior state court judges to its programs, and about 30 such judges will attend one of our institutes or seminars. In 2002 we will again invite state judges to our programs.

Since 1987 the LEC has been an integral unit of George Mason University School of Law. LEC Director F. H. Buckley has been a Professor at the Law School since 1989, and LEC Chairman Mark F. Grady is the Dean of the Law School.

LEC Judicial Advisory Board

The LEC's Judicial Advisory Board advises the LEC on its programs and practices. All members of the Judicial Advisory Board have taken more than one LEC institute. The Board members are:

- Douglas H. Ginsburg of Court of Appeals for the District of Columbia Circuit
- Lynn N. Hughes of the Southern District of Texas
- Edith Hollan Jones of the Court of Appeals for the Fifth Circuit
- Blanche M. Manning of the Northern District of Illinois
- Pauline Newman of the Court of Appeals for the Federal Circuit
- A. Raymond Randolph of the Court of Appeals for the District of Columbia Circuit
- Myron H. Thompson of the Middle District of Alabama
- Vaughn R. Walker of the Northern District of California
- Evan J. Wallach of the U. S. Court of International Trade
- Jack B. Weinstein, Senior Judge from the Eastern District of New York

Our Academically Exciting Offerings for 2002

In 2002, the LEC will offer six different one-week institutes and two shorter colloquia. As in the past, world-class scholars will lecture on challenging academic topics.

The LEC's economics institutes give judges a structured environment in which to surmount the intellectual obstacle of learning microeconomics. The LEC's science institute also offers participants a solid review of the methodological and technical knowledge needed to resolve many scientific issues that arise in court.

While economic and scientific issues remain of critical importance, there is a wide variety of problems that have not been addressed by our programs. New LEC institutes on *Aristotle's Ethics, American History* and *The Idea of America*, as well as the two new academic colloquia, will offer participants an opportunity to consider and discuss broader social and philosophical issues.

The LEC also supports faculty research at George Mason University School of Law.

For further information about our programs, including instructor web pages, please consult our web site at www.lawecon.org.

Our Programs

Our programs are academically demanding. Readings for our institutes average about 500 pages, with 21 hours of lectures and discussion. Participants are expected to have done all the readings and to attend all sessions.

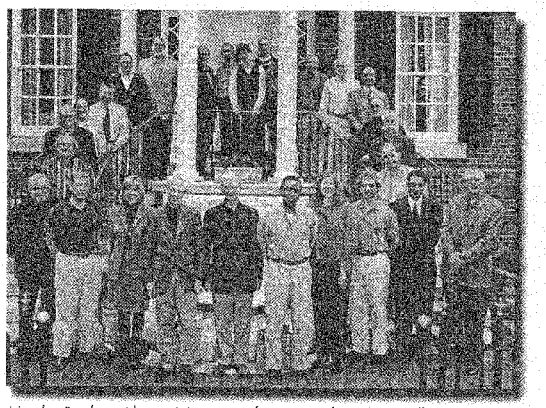
Our institutes are held in retreat settings with the LEC assuming hotel, meal and transportation expenses for participants. Apart from the lectures and meals, the LEC does not support any other activities at its judicial programs, and does not cover any expenses for spouses.

Donor Support

The LEC is supported by a large number of individuals, independent foundations, and corporations. Support from corporations accounts for about 13% of our revenues. In 2001, the median corporate donation was 0.4% and the mean was 0.7% of our revenues.

We are supported by several of our alumni(ae) on the bench. Last year contributions from judges totaled $38,000. We are most grateful for this generous support, given by those who know us best.

Our programs are designed solely by academics at George Mason University School of Law.



Martha Bayles with participants at the LEC's John Stuart Mill seminar, Alexandria, VA, March 2001

Aristotle and the Virtues

April 26 to May 2, 2002
Winston-Salem, NC

In recent years moral philosophy has returned to one of the oldest questions of philosophy: How should one live?

Aristotle on Human Excellence *Nicomachean Ethics I.II*	Harvey Mansfield Department of Government Harvard University
The Great Souled Man; Courage, Temperance, Liberality *Nicomachean Ethics III-IV*	Harvey Mansfield Department of Government Harvard University
Prudence and Self-restraint *Nicomachean Ethics VI-VII*	Harvey Mansfield Department of Government Harvard University
Aristotle on Amity	Lorraine Pangle Department of Political Science University of Toronto
Patriotism	Michael Ignatieff Kennedy School of Government Harvard University
Maimonides on Piety	Hillel Fradkin American Enterprise Institute
Beyond the Virtues: Flaubert's *A Simple Heart* and Dostoyevski's *Notes from the Underground*	Roger Shattuck Professor Emeritus Boston College

Harvey Mansfield's most recent book is a new edition of Toqueville's *Democracy in America* (with Delba Winthrop). Lorraine Pangle recently completed a book on Aristotle's theory of friendship. Michael Ignatieff is a MacArthur Prize winner whose recent work has centered on nationalism. Hillel Fradkin writes on religion and politics. Roger Shattuck is the author of *The Banquet Years* and *Forbidden Knowledge*, and is a leading Proust scholar.

Harvey Mansfield

Lorraine Pangle

The Idea of America

June 3 to 9, 2002
Santa Fe, NM

What are the special qualities of the American experience, as these have traditionally been identified?

America in Poetry	Dana Gioia
Religion	A. James Reichley Public Policy Georgetown
Individual Initiative: Benjamin Franklin	Ralph Lerner Committee on Social Thought The University Chicago
Individualism and Self-reliance: Emerson	Barry Sanders Department of English Pitzer College
Community: Tocqueville	Peter Berkowitz George Mason School of Law
An Immigrant Nation	George Borjas Kennedy School of Government Harvard University
The Frontier: Frederick Jackson Turner and the films of John Ford	Paul Cantor Department of English University of Virginia

Dana Gioia is one of this country's leading poets. James Reichley is one of the leading scholars on the role of religion in America and the author of *Religion in American Public Life*. Ralph Lerner is a distinguished constitutional scholar. Barry Sanders is the author of *The Private Death of Public Discourse* and a professor at Pitzer College. Peter Berkowitz is a noted political philosopher at George Mason University School of Law. George Borjas is one of this country's leading scholars of immigration. Paul Cantor's most recent book is *Gilligan Unbound*, an essay on popular culture.

Dana Gioia

George Borjas

The Forging of a Nation

June 10 to 16, ,2002
Santa Fe, NM

This institute will focus on the writings of the Founders, with the assistance of a group of America's leading historians.

Washington	Gordon Wood Department of History Brown University
Jefferson	Joseph Ellis Department of History Mt. Holyoke
Madison	Ralph Lerner Committee on Social Thought University of Chicago
Hamilton	Joanne Freeman Department of History Yale University
Adams	Pauline Maier Department of History MIT
Lincoln	Harry Jaffa Department of Government The Claremont Institute
Republicanism in a Democratic Age: *The Education of Henry Adams*	Thomas Pangle Department of Political Science University of Toronto

Gordon Wood and Joseph Ellis are both Pulitzer Prize winners for their books on early American history. Ralph Lerner is a noted constitutional scholar. Joanne Freeman is the editor of a Library of America edition of Hamilton's works. Pauline Maier's *American Scripture* was a finalist for the National Book Critics award. Harry Jaffa is a leading authority on Lincoln, and Tom Pangle is a noted political philosopher.

Pauline Maier

Gordon Wood

The Economics of Private Law

September 20 to 26, 2002
San Diego, CA

This institute offers a solid introduction to the economic analysis of private law, with two sessions on microeconomics theory followed by five sessions of applications to private law issues.

Microeconomics I	Charles Goetz University of Virginia Law School
Microeconomics II	Charles Goetz University of Virginia Law School
Property	David Friedman Santa Clara Law School
Contract: Free Bargaining and Its Limits	Richard Epstein University of Chicago Law School
Tort Law	Mark Grady George Mason Law School
Product Liability Law	George Priest Yale Law School
Litigation Theory	George Priest Yale Law School

Charles Goetz is the author of a leading law-and-economics casebook and has written many of the leading studies on the economic analysis of contract law. David Friedman is the author of *Hidden Order* and *Law's Order*. Richard Epstein is one of America's prominent legal scholars, and Mark Grady is a leading torts scholar. George Priest is a past-president of the American Law and Economics Association.

Charles Goetz

George Priest

The Economics of Public Law

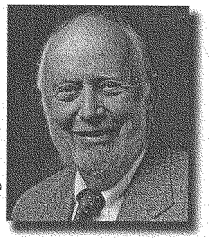
September 27 to October 3, 2002
San Diego, CA

The institute equips participants with the analytical tools needed to deal with a variety of issues in antitrust economics and public choice. The first two lectures will lay the microeconomics foundation for the specific antitrust issues dealt with in the third and fourth sessions. The next two sessions will examine the important literature on public choice. The last session is devoted to new institutional economics.

Microeconomics I	Richard Ippolito George Mason Law School
Microeconomics II	Richard Ippolito George Mason Law School
Antitrust I: Cartels, Predatory Pricing, Market Determination	Kenneth Elzinga Dept. of Economics University of Virginia
Antitrust II: Resale Price Maintenance, After Markets, Exclusive Dealing	Fred McChesney Northwestern Law School
Introduction to Public Choice	James Buchanan Department of Economics George Mason University
Public Choice: Federalism	Barry Weingast Department of Political Science Stanford University
The Role of Institutions	Douglass North Department of Economics Washington University

Richard Ippolito is one of America's leading labor economists, and Ken Elzinga and Fred McChesney are recognized experts on the economic analysis of antitrust law. Barry Weingast is a leading Public Choice scholar. James Buchanan and Douglass North are Nobel Prize winners in economics.

James Buchanan



Douglass North

Science on the Courts

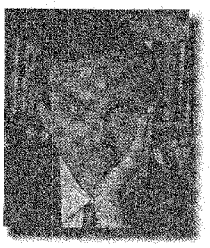
December 6 to 12, 2002
Sarasota, FL

The Science in the Courts institute offers participants a solid review of the methodological and technical knowledge needed to resolve many scientific issues, such as risk and cost-benefit analysis.

Philosophical Realism	John Searle Department of Philosophy University of California at Berkeley
Medicine	Sally Satel Yale School of Medicine
Scientific Method I	James Trefil Department of Physics George Mason University
Scientific Method II	James Trefil Department of Physics George Mason University
Public Health	Bruce Ames Dept. of Biochemistry University of California at Berkeley
Risk Assessment I	Kip Viscusi Harvard Law School
Risk Assessment II	Kip Viscusi Harvard Law School

John Searle is one of America's leading philosophers, and the author of *Speech Acts*. Sally Satel is the author of *P.C.M.D.* James Trefil, Robinson Professor at George Mason University, is a leader in the scientific literacy movement. Bruce Ames is the director of the National Institute of Environmental Health Science at UC Berkeley and is one of the most frequently cited scientists. Kip Viscusi is the Director of the Harvard Program on Empirical Legal Studies.

Sally Satel



Kip Viscusi

Academic Colloquia

Shakespeare on Liberty: The Roman Plays
Savannah, GA
March 21-24, 2002

The Unheavenly City: Jane Jacob's Life and Death of Great American Cities at 40
Montreal, Quebec
May 16-19, 2002

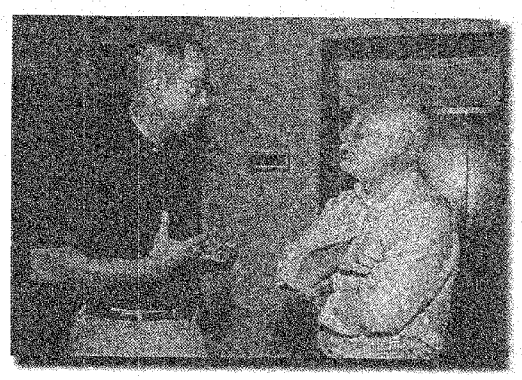
The LEC will offer two two-day colloquia for judges. In each case the reading materials will consist of about 250 pages of material, which will be discussed in five 90-minute sessions. The discussion leaders for the two colloquia will be John Alvis of the Department of English at the University of Dallas and Alan Ehrenhalt of *Governing Magazine*.

The Shakespeare colloquium will feature *Coriolanus*, *Julius Caesar*, and *Anthony and Cleopatra*, together with short readings from Plutarch and Benjamin Constant. The Unheavenly City colloquium will feature readings from Jane Jacob's *Life and Death of Great American Cities* as well as Alan Ehrenhalt's *Lost City*.

All participants will be expected to have read all of the materials before the colloquia begin. If you do not think your schedule would permit this, please decline this offer and we will try to include you in a subsequent seminar.

John Alvis

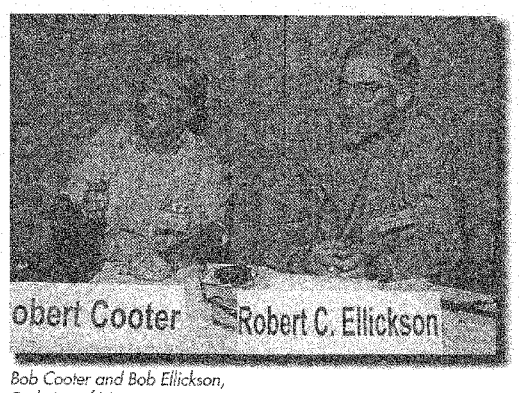
Alan Ehrenhalt



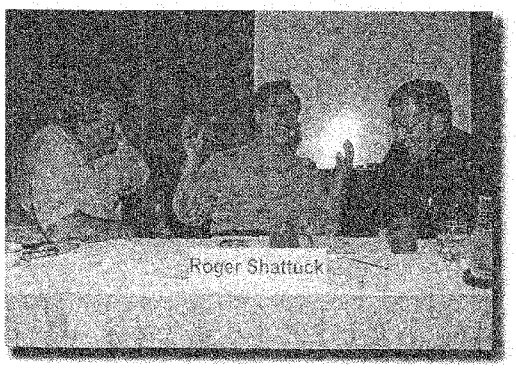
Judge Costa Pleicones with Lionel Tiger, The Evolution of Norms, Santa Fe, NM, June 2001

Judge Harold Baer with Ralph Lerner, Rationalism in Politics Charleston, SC, March 2001

Jean Elshtain and Roger Scruton, Individual Responsibility Santa Fe, NM, June 2001



Bob Cooter and Bob Ellickson, Evolution of Norms Santa Fe, NM 2001



Judges Thomas A. Wiseman and Kenneth C. Mackenzie with Roger Shattuck, Individual Responsibility Santa Fe, NM 2001

Judge Gary E. Stronkman with Jonathan Clark, Individual Responsibility Santa Fe, NM 2001

Comments by Judges Who Have Attended Our Programs

After each program we ask judges to comment on it. The comments have been uniformly positive, and the following excerpts are illustrative.

Our institutes give judges a better appreciation of the consequences of their decisions

- "The intersection of law-and-economics gave me an entirely new way to consider antitrust law and its impact on business organization. The institute gave me a valuable working understanding of current antitrust law and its economic bases. It will be very valuable."
- [The institute] "alerts judges to the practical economic consequences of rulings beyond the obvious immediate disposition."

Our institutes teach judges how to evaluate expert witness

- "I feel more confident when dealing with the so-called experts. The expert is more likely to tell the truth if he believes I know something about the subject."
- "I now have a more informed perspective, can frame a more intelligent analysis, and am less dependent on selective input from counsel and witnesses."

General Comments

- "The whole thing was an intellectual feast. The interaction with professors and other judges was wonderfully stimulating."
- "Despite the reading load, I enjoyed every minute! ... I found myself actually getting eager to have a scientific issue come before me soon."
- "You presented an incredibly substantive program in a short period of time, utilized outstanding professors, and chose topics of great value to me in my work as a judge. By presenting scientific concepts in a clear and understandable manner, you gave me the ability to make more informed and rational judicial decisions about scientific evidence."
- The "greatest value is one of perspective. I tend now to take things less for granted, to entertain the possibility that conventional wisdom may not be wisdom at all."
- "I don't understand how I functioned before I had statistics and basic economics."
- "It was thrilling for me to have an opportunity to review classics of Western thought with the eminent scholars you brought together. I am confident that all of the judges expanded our perspectives based on the readings and the in and out-of-class discussions."

George Mason
Law and Economics Center

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Mark F. Grady
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Director, Law & Economics Center

John P. Giacomini
Director of Special Programs

Dianne Cannon
Program Officer

September 2001

School of Law

George Mason University

Remarks by Chief Justice William H. Rehnquist
American Law Institute's Annual Meeting
The Mayflower Hotel, Washington, D.C.
Monday, May 14, 2001

Thank you Traynor for the kind introduction. This was to be Charlie Wright's last meeting as President of the American Law Institute and I know that the Institute and our profession miss him. I thought I would speak today about one of Charlie's favorite subjects: legal education.

Last July, legislation was introduced in Congress that would sharply limit the educational opportunities available to federal judges. The bill was proposed after a private organization issued a report critical of judges' attending private educational seminars at the expense of the seminar sponsors. Known as the Kerry-Feingold bill, it would prohibit federal judges from accepting "anything of value in connection with a seminar." The bill would give the Board of the Federal Judicial Center the power to authorize government funding for judges to attend only "seminars that are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary."

Critics of privately funded seminars refer to them as "junkets"; the television program 20/20 recently aired a segment about a seminar held last winter at a resort in Tucson that was attended by a number of federal judges. One could easily get the impression from this presentation that the real problem is too many judges playing golf in the middle of the afternoon in Tucson in February. There was a time when federal judges worked less than they do now; I remember many years ago a judge referring to an appointment to one of the courts of appeals as being a "dignified form of semi-retirement." If that was ever true, it long ago ceased to be. The pressure to keep up with ever-increasing dockets requires and receives hard work from these judges. And so far as the locale of any seminar is concerned, does anyone really think that a seminar in Tucson in August or in Milwaukee in January would attract as many participants if the scheduling were reversed? If you do think that, I suggest you schedule the next meeting of the ALI here in Washington for the middle of August.

The principal vice of the Kerry-Feingold bill is that it lays down a vague standard: "The seminar must not be conducted in a fashion that might undermine 'the public's confidence in an unbiased and fair-minded judiciary'" and it confides to a government board -- the board of the Federal Judicial Center -- the obligation to administer this standard -- an obligation which the Board has firmly requested not be placed upon it.

The approach of the Kerry-Feingold bill is antithetical to our American system and its tradition of zealously protecting freedom of speech. Justice Holmes famously noted (in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919)), "that the ultimate good desired is better reached by

free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . . "

In his essay "On Liberty," John Stuart Mill pointed out the risks inherent in suppressing ideas:

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Existing legal and ethics provisions quite properly restrict judges from accepting benefits from parties to litigation before them and provide for disqualification in any instance where a judge's impartiality might reasonably be questioned. The current financial disclosure requirements also ensure that information regarding attendance at private seminars at the expense of the seminar sponsors is readily available to the public.

Both the Judicial Conference of the United States and the Board of the Federal Judicial Center are on record as opposing the Kerry-Feingold bill. And the FJC Board has pointed out that the legislation would jeopardize the Federal Judicial Center's ability to cosponsor seminars with law schools and other organizations. The legislation is also opposed by the Federal Judges Association and the deans of a number of law schools.

The Federal Judicial Center has done an exceptional job providing continuing education for federal judges and court personnel. But the Center cannot provide education to every federal judge each year on the wide array of subjects that judges confront every day, especially issues that are primarily local. And the FJC Board should not be asked to decide for individual judges which seminars they may attend. As Adam Smith explained in the context of economic regulation 225 years ago,

> [E]very individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would . . . assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would no-where be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.

Seminars organized by law schools, bar associations and other private organizations are a valuable and necessary source of education in addition to that provided by the Federal Judicial Center. The effect of the Kerry-Feingold bill would be dramatically to restrict the information made available to federal judges through seminars by requiring that the content of that information and the identities of its presenters be weighed against a prediction of public confidence in fair-mindedness. Who knows whether seminars sponsored by one or another law school, or even by this body -- the ALI -- would pass that test?

The notion that judges should not attend private seminars unless they have been vetted and approved by a government board is a bad idea. It is contrary to the public interest in encouraging an informed and educated Judiciary, and contrary to the American belief in unfettered access to ideas. Thank you.

Washington D.C. Lawyers Chapter Luncheon Address, May 24, 2001
Judicial Seminars: Political Correctness or Appeal to Ethics?

Honorable A. Raymond Randolph, *U.S. Court of Appeals for the D.C. Circuit*

Mark Twain thought that "it takes your enemy and your friend, working together, to hurt you to the heart, the one to slander you and the other to get the news to you."

Twain's remark came to mind the other night when I watched an ABC News story on Federal Judges. The story was on a program called 20/20. After it ended, I was tempted to pick up the phone and call some of my judge friends who were - to put it nicely - prominently displayed.

The 20/20 story was an exposé about federal judges attending legal education seminars run by a law school — and the deep ethical implications of such judicial conduct.

After the 20/20 program, a spate of "me-tuem" editorials appeared. Now the Chief Justice has given a talk on the subject at the meeting of the American Law Institute and The *Washington Post* responded with an editorial entitled "Mr. Rehnquist and Junkets."

I think it is worth studying the 20/20 program, and not just for the subject of federal judges and private seminars. Pay attention also to the technique - if you'd like to smear an institution or individuals, this is an instruction manual.

Here is a summary. With the Honorable Barbara Walters presiding, and reporter Brian Ross doing most of the talking:

- The program personally maligned several federal judges.
- Intellectually worthwhile programs at George Mason Law School — which ran the seminar — were unfairly attacked, mainly by innuendo.
- Federal judges in general were subjected to distorted, biased and untrue reporting.
- And academic freedom and the First Amendment suffered a couple of blows as ABC tried to bully George Mason into following ABC's party line of what is right and good for American jurisprudence — as if ABC had any expertise on the subject.

Let me set the stage. The program opens with video footage of a golf course in Tucson, Arizona. It is December in Tucson, warm and lovely. A few old men — my friends will pardon me for so describing them — are milling about golf carts. Ross's voiceover begins:

> "Three o'clock on a glorious Tuesday afternoon in Tucson, Arizona. It's the middle of the workday for most people. But here at one of the top golf courses in the country, a group of U.S. Federal Judges, their courtrooms and black robes far away, is finishing up the ninth hole.
>
> Brian Ross: "Afternoon" — across the fairway, two other federal judges, from Iowa, where it was cold and snowy on this December day, are heading for a tough Par 5. "How was the game?"
>
> Judge Edmonds: Oh, we are not done. We're just on the third hole.
>
> Brian Ross: And at the swimming pool, there's a federal judge from Ohio doing laps, while another one, from California, leisurely catches up on some sun and the newspapers. All part of an educational program that others call an entirely inappropriate junket.

Pay close attention to the words — an inappropriate junket "others" say. Who exactly are these others?

In the course of the program you will discover only two people who fit that description. One is Douglas Kendall, the head of some outfit called The Community Rights Council. The other is, I am sorry to say, my former colleague Abner Mikva. They are affiliated with each other, although 20/20 doesn't tell you.

The opening scenes of the program and the commentary are designed to set a tone. The pitch is this: While everybody else was working hard and freezing to death, these lousy federal judges were sunning themselves at this fabulous golf resort free of charge. OUTRAGEOUS! A junket — a trip ginned up to appear as if it were an educational program when in fact it was just a vacation.

Please permit me a side comment. I've been to this golf course, Tucson National. It's a dog track. I wouldn't play there. In Tucson, I prefer a far superior course, a public one — The Randolph course, an LPGA tour stop each year. They have great hats there, saying "Randolph, established 1923." When I wear one it makes people think I look young for my age.

Anyway, back to 20/20. The golfing and the

swimming and the sunning are—to use the words of our intrepid reporter Brian Ross—"part of an educational program" run by The George Mason University Law and Economics Center.

I will be blunt. That is a lie and Ross had to know it. Golf and swimming are no part of the educational program. One might as well say that bar hopping in Georgetown on Saturday night is part of Georgetown University's curriculum.

What students do and what the student-judges do on their free time between classroom sessions is their business—as in any academic setting.

Of course it is ABC's business to confuse the matter, to mesh free time with academic time, because that will make the judges look bad, and it will tarnish George Mason, and it will create a scandal and who knows, maybe 20/20's ratings will improve.

You might be wondering by now what is the nature of the educational program these judges are attending? If you watched 20/20, you would still be wondering. Television does not usually provoke critical thought. Whatever message it conveys is more or less just absorbed. The producer of 20/20 wanted to divert the viewer from the content of George Mason's seminar and focus instead on the golf and the hotel and the sun and who puts up the money, and 20/20's ultimate charge that this is some sort of secret right-wing boot camp poisoning the minds of the federal judiciary.

And so the viewing public never got to know that among the distinguished lecturers who have appeared at George Mason's program—which has been going on for more than 25 years—are many of the leading scholars of our time, including six Nobel Prize winners and such luminaries as Orley Ashenfelder from Princeton and George Priest from Yale. And in its programs on science and the arts, George Mason has attracted such distinguished faculty as Walter Berns and James Q. Wilson and Bruce Ames and the philosopher of science John Searle, famous for his Chinese room hypothetical.

At one point in the program, reporter Ross has this Mr. Kendall criticize—we have no idea what Kendall's qualifications are—an economic concept discussed in the seminar. Kendall calls this an example of "bias". What reporter Ross neglects to say—here I will give Ross the benefit of the doubt and attribute his neglect to sheer ignorance—is that the economic concept is the Coase Theorem, named after Ronald Coase and for which Coase won the Nobel Prize in economics.

I could go on but you get the idea—George Mason is presenting serious academic stuff about subjects that should be, and are, of great interest to federal judges who wish to broaden their thinking, which one would hope includes all federal judges.

Now for the ethics part. Mr. Ross begins: "It turns out that corporations and pro-business groups have quietly been spending millions of dollars to finance such lavish outings for judges."

Note the word "quietly"—as if they are sneaking around, making secret drop-offs of cash, engaging in some nefarious doings which again our intrepid reporter has unearthed. And what exactly in Ross's mind is a "pro-business group"? Something distinguished from an anti-business group?

"This particular seminar," Ross tells the viewers, "was sponsored by what's known as the law and economics center, run out of the Law School of George Mason University in suburban Washington, a school whose pro-business teachings have made it a favorite among many corporate executives.

"In fact, the corporate sources of the money are not made public by the George Mason Law School, which is located a long way from the golf courses of Tucson, in the suburban sprawl of Arlington, Virginia. No seminars for judges are held here."

Another not so subtle dig—why not hold the seminars in the D.C. area? I can tell you —the hotels and food are too expensive around here. Tucson is much cheaper, and judges are going to be flying in from all over anyway.

There's another reason. Speakers like to go to nice places. Martin Ginsburg, the Justice's husband —has a very funny biography. One of Marty's lines is that he is a "frequent speaker - mainly in warm climates."

What is 20/20's problem anyway? That judges are going to nice places to participate in seminars? So everything would be just fine and dandy if all seminars had to be held in midwinter in a cornfield in Iowa?

The rest of the 20/20 program consists in Ross questioning Mark Grady, the fine Dean of George Mason Law School, about the source of the funding for the programs; the Dean refusing to give names but agreeing that some money comes from corporate donations; and Ross saying that two unnamed ethics experts think judges have a duty to find out who is footing the bill before they attend one of these seminars.

The program ends with Ab Mikva pronouncing that there is an appearance of impropriety, without mentioning that the appearance is precisely what he is trying to create.

Now let me say a word about Ab. We served together on the D.C. Circuit for several years. Then Ab left to become White House Counsel during part of the Clinton Presidency—not exactly a good career move, I thought at the time, but we have different tastes and I wished him well. Anyway, Ab wrote this little article touting the position of the Community Rights Council against judges attending seminars, and of all things he trotted out his experience in the Clinton White House.

Now, I know Ab is of a different philosophical persuasion. Even so, you have to be utterly out of touch with reality to use the Clinton White House as a model of ethical behavior for anyone, let alone the federal judiciary.

Enough of 20/20's ethical slant. Now let me give you the truth. Federal judges are governed by the strictest ethics code of any branch of government. No one can talk to a judge *ex parte* about a case. There are rules against it. There are also rules against accepting gifts from litigants and discussing the merits of pending or impending cases. I know from personal experience that the federal judges of this country are conscientious about adhering to the code of conduct.

So what is the real beef of people like the 20/20 producers and those of similar persuasion? It's not with ethics - that's a smokescreen. Their problem is with the content of the seminars. They have no faith in what Holmes called the market place of ideas. Why should they? They have no faith in free markets generally. Rather than try to counter ideas with ideas of their own, their tactic—hardly a new one—is to silence the opposition.

This is why Douglas Kendall and those like him are really the new censors. They disguise their true objective by proclaiming that they are really trying to root out bias, or that they just want objectivity. But who decides what is objective? Shakespeare said it best—"Aye, there's the rub."

Of course, if a seminar is being run by a litigant or a potential litigant in the judges' court and concerns a subject that touches on litigation, a judge would have to be a fool to attend. It is not just common sense. It is also something governed by our ethical rules. Any party can raise the issue.

Two final questions should be asked. First, must a judge refuse to attend a seminar because it deals with matters that may come up in his court? Second, must the judge always conduct an inquiry into the source of funding for the seminar or the program?

There is no absolute answer to either question, nor should there be. The most that can be said is that it depends. That is where the federal judiciary's code of conduct committee left the matter in its advisory opinion no. 67. That is where it should be left in any ethical code. Let me illustrate. Suppose a judge were invited to a seminar on the Mechanics of Seatbelt Failures in Automobile Crashes, at more than 20 miles per hour. If the judge hears these kinds of cases, he ought to give some thought to finding out who is financing the program. If it is some Ralph Nader litigation arm, this could make a difference and he should not attend, even if Mr. Nader planned to hold the seminar in a cornfield in Iowa in January.

On the other hand, suppose the conference is on the structure of DNA. The Einstein Institute, a nonprofit organization based in Washington, runs such seminars for state and federal judges. I attended one. It never occurred to me that I should ask the Einstein Institute where it gets its money. Why should that matter?

The Einstein Institute trains far more judges than George Mason. Yet, I've not heard Ab Mikva or these unnamed "others" criticizing its programs. Why not? Because as far as I know, there's no conservative or liberal DNA. It's just DNA.

When the seminar is part of a university's educational system—as George Mason's is—things are very much removed. I'm told—and so was 20/20, but they decided to suppress it—that only a small percentage of their funding comes from corporations, around 15% (the rest is from foundations) and no one corporation makes up more than 1%. So if you're a judge attending one of these seminars, you can thank the XYZ corporation for the ham sandwich you had for lunch.

When I am invited to speak or attend programs at law schools around the country—and they pay my transportation and put me up in a fancy hotel and wine and dine me—what am I supposed to do according to people like my friend Ab Mikva? Ask the university to please supply a list of all its corporate and individual and institutional donors? And after I get the list, what do I do with it?

I can assure you no judge in his right mind would say — "Well, the XYZ Corp. contributes to your university and it sometimes has cases in my court. Therefore, I must refuse your kind invitation to attend your seminar on Judge Jeffries and the Bloody Assizes." If that were the rule, no judge would be able to speak at any institution of higher learning in America.

I want to leave you with two thoughts. The first is that the federal judiciary is the most ethical, law abiding group of government officials in this country and it has been that way for quite some time. Dishonest and distorted reporting cannot and will not change that fact. We can only hope that it will not alter public perceptions of the federal judiciary.

The second thought—in light of 20/20's performance and a good deal of the same sort of thing in public life—is something Samuel Johnson said more than 200 years ago: "You ought to be perpetually watching. It is more from carelessness about truth than from intentional lying that there is so much falsehood in the world."

I look forward to giving this speech again at the next Federalist conference in Bali.

UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10278-0001

CHAMBERS OF
JUDITH M. BARZILAY
JUDGE

November 15, 2001

Via Facsimile: 202-225-5851

Hon. Steven Rothman
U.S. House of Representatives
1607 Longworth House Office Building
Washington, D.C. 20515

Re: Hearing on Educational Programs for Federal Judges

Dear Congressman Rothman:

Your staffer, Arlene Miller, suggested I fax this letter to you. It is my understanding that your House Subcommittee on the courts will hold a hearing on November 29, 2001 to discuss private educational programs for federal judges including those sponsored by the George Mason Law and Economics Center. As one of your constituents and a participant in several of George Mason's programs, I write in support of those programs.

First, a few words to establish my bonafides. I am a 1998 Clinton appointee to the U.S. Court of International Trade, a federal court of limited jurisdiction confined to adjudicating cases brought under the import and export statutes of the United States. I am a registered Independent, but would described myself as a fairly unreconstructed 60's liberal. (That last statement has probably ruined whatever chances I might have had for appointment to the appellate bench).

The George Mason programs are the only private educational programs for judges that I have attended. They are academic in nature, do not espouse any particular point of view, and attract only the best professors. For instance, in one program I attended, *Economic Implications of Public Law*, we were privileged to hear from Dr. James M. Buchanan, who is a Noble Laureate in economic science. Last summer I attended a program on the *Evolution of Norms*, where our instructors included Professor Lionel Tiger of Rutgers (another New Jersey alum) and other professors from Berkeley and Yale.

My friends at George Mason tell me that corporate funding accounts for only 13% of their budget and they do not disclose their donors. Therefore, there is no opportunity for judges to be influenced to benefit one of their donors since we have no idea who they are. In addition, these programs are held off-site as George Mason does not have retreat facilities such as the ones at

Princeton, New York University, Yale and The University of Virginia. These programs are scheduled off-season so that George Mason can get reasonable rates from the hotels involved.

Congressman Rothman, I have found the two programs that I attended to be of enormous value as they gave me an opportunity to study with the most knowledgeable professors along with other federal judges, eager to be there and to question all the assumptions proposed. It was truly an intellectual feast. We federal judges are called upon to handle more and more cases, sometimes in a highly accelerated atmosphere. It is my opinion that these programs allow us to charge our batteries so that we can return to our jobs to be even more effective public servants. They are important and the Congress should not act to curtail them. I encourage you to join me at one of the programs in the future, if you can. You would be most welcome. Should you have any questions, I would be pleased to speak with you. Call me anytime in my chambers at 212-264-5420.

Very truly yours,

Judith M. Barzilay

Judith M. Barzilay

JMB/mrt
bcc: Prof. F.H. Buckley

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
FEDERAL COURTHOUSE
101 HOLMES AVENUE, N.E.
HUNTSVILLE, ALABAMA 35801

CHAMBERS OF
C. LYNWOOD SMITH, JR.
JUDGE

November 21, 2001

Honorable Spencer T. Bachus, III
United States House of Representatives
442 Cannon Building
Washington, D.C. 20515

Dear Congressman Bachus:

I am informed that representatives of an organization called the "Community Rights Counsel" have appeared before the House Subcommittee on the Courts for the purpose of asking that educational programs for federal judges sponsored by George Mason University's Law & Economics Center be banned.

Unfortunately, I have been away from Huntsville for much of the past few weeks, in my Birmingham Chambers and Courtroom, and only now have had an opportunity to respond to this attack. I hope this letter does not come too late to have some influence on your thought process.

I am not familiar with the so-called "Community Rights Counsel" or its purposes, but I do know something about George Mason's Law & Economics Center. I attended one seminar sponsored by that organization. The subject was "Liberty and Virtue in Early American Thought," and it was held from June 9 through 15, 2000, in Santa Fe, New Mexico.

I can describe that seminar in one sentence: It was the most extraordinary, and intellectually challenging, educational experience since the end of college and law school.

We read and discussed books and extracts from writings by such persons as Locke, de Tocqueville, Washington, Adams, Madison, Hamilton, and Jefferson, among others.

Advisory ethical opinions require that I inquire into the sources of funding for educational programs if there is a reasonable question concerning the propriety of my participation. Based on my personal experience, I have no such questions. There was nothing "partisan" about this program, unless one entertains the perverted opinion that an academic examination of the philosophical foundations of the American Revolution and our Constitution exhibits, in some pejorative sense, a bias that might be reflected in a judicial opinion.

Quite frankly, the whole notion that George Mason University's Law & Economics Center is tendentiously promoting a particular political agenda is ridiculous. The judges who attended the Santa Fe program were nominated by Democratic and Republican Presidents, and each held strong individual opinions, ranging from "conservative" to "liberal," with numerous gradations along the continuum between those poles. Our discussions often turned into debates that were lively, informative, and intellectually refreshing. The whole experience was so provocative that, in the past year, I have purchased no less than twenty books on the Revolutionary period, and read myself to sleep each night. I have not utilized an extract from any one of them in an opinion, but I certainly have grown in the depth and breadth of my appreciation for the truly extraordinary accomplishments of the founding generation of this nation that I am immensely proud to serve.

For all of these reasons, I sincerely hope that you will give careful consideration to preserving the opportunity for members of the federal judiciary to participate in future educational programs sponsored by this institution.

Very truly yours,

C. Lynwood Smith, Jr.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
402 FEDERAL COURTHOUSE
GRAND RAPIDS, MICHIGAN 49503-2363

CHAMBERS OF
ROBERT HOLMES BELL
CHIEF DISTRICT JUDGE

(616) 456-2021

November 14, 2001

Hon. John Conyers, Jr.
United States Congressman
2426 Rayburn House Office Building
Washington, DC 20515

RE: Judicial Private Educational Programs for Judges

Dear Congressman Conyers:

It is my understanding you sit on the important congressional subcommittee of 'Courts, the Internet and Intellectual Property,' which will be considering the criticisms leveled against private educational programs for federal judges funded, presumably, by corporate donors. I don't pretend to have expertise in this area but believe you may benefit from the observations of my colleagues and myself.

All of my colleagues and I have attended seminars sponsored by George Mason University Law and Economics Center of the School of Law. These were a far cry from a "boondoggle." All of us worked very hard reading and studying during the seminars. Clearly I speak for my colleagues in observing that we never observed any 'partisan slant' to any presentations or any 'indoctrination' into a philosophy of law either conservative or liberal. We were appointed by republican and democrat presidents and personally hold different political positions, but are unanimous in agreement that the George Mason seminars were among the best judicial education programs we have attended.

I find it both shameful and demeaning that some 'political action committee' will receive widespread national publicity unfairly attacking the integrity of the federal judges attending educational seminars. We judges cannot publically defend our educational experiences and must rely upon Congress to see the truth and turn back such scurrilous attacks. Your interest in this topic is most appreciated.

Sincerely,

Robert Holmes Bell
Chief United States District Judge

RHB/kb

cc F. H. Buckley

UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10278-0001

CHAMBERS OF
RICHARD W. GOLDBERG
SENIOR JUDGE

November 29, 2001

Congressman Howard Coble
Congressman Howard L. Berman
Committee on the Judiciary
Sub-Committee on Courts, the Internet and
Intellectual Property
2138 Rayburn House Office Building
Washington, DC 20515

Dear Congressmen:

It is my understanding that your sub-committee held hearings today on the matter dealing with Judicial education sponsored by private institutions.

Over the 11 years that I have been on the bench, I have attended several seminars sponsored by George Mason University and one seminar at Princeton University.

I have found the subject matter at all of these seminars to be invaluable for my work both at this court and at other courts when I sit by designation.

I feel that the benefits from these seminars broaden the education of judges so that we can look at areas of law and economics that relate to our work on the court.

My understanding is that Mr. Doug Kendall feels that because some of these seminars are funded by private entities, such as corporations, that somehow judges will be improperly influenced. I wish to inform you that the judges that do attend these conferences have no idea where the resources came from, nor are we interested in knowing. Never have I seen any indication from any of the faculty that there was some sort of "agenda". Hopefully, your committee will learn about the excellent seminars presented by George Mason and others.

While the meeting places are very nice, they are less expensive than holding the seminar in D.C. or another large city. I can assure you that the seminar itself uses up most of the time.

Over the years, I have met judges that have been appointed to the bench by President Nixon to President Clinton. I have never heard any judge complain or suggest that the programs are not helpful. It does seem to me that these programs should be kept intact and hopefully whoever testifies will explain it in more detail.

Should you desire any further or additional information, please contact me at (212) 264-9741, or at the above address.

With warmest personal regards, I am

Sincerely yours,

Richard M. Goldberg

bcc: Mark F. Grady
F.H. Buckley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
U.S. POST OFFICE & COURTHOUSE
P.O. BOX 3684
LITTLE ROCK, ARKANSAS 72203

G. THOMAS EISELE
SENIOR JUDGE

November 9, 2001

Hon. Asa Hutchinson
United States Representative
Via Fax Delivery 202/225-5713

Re: Educational Programs for Judges
George Mason Law & Economic Center

Dear Asa:

I have been advised that a representative of an organization known as the "Community Rights Counsel" will appear before the House Committee on the Courts next Wednesday to argue that federal judges should not be permitted to attend the academic programs conducted by George Mason. Since I have attended many of the programs conducted by George Mason and its predecessors, I wanted you to have the benefit of my assessment of those programs.

First, I want you to know that I, as a federal judge, have attended educational programs during my thirty-one years on the bench at the following universities among others: Harvard, Yale, Columbia, New York University, Duke, Princeton, University of California at Berkeley, St. Louis University, Southern Methodist University, University of Mississippi, Louis & Clark University of Portland, Oregon, University of Arkansas at Fayetteville, and University of Arkansas at Little Rock.

I have also attended enumerable educational programs sponsored by the Federal Judicial Center. As you can see, I believe it is important for judges to take advantage of high quality educational programs because, simply put: education improves judges just as it improves others.

When I attended law school in the late 1940's the curriculum placed little emphasis on economic theory and its relationship to the law. That curriculum also did not emphasize the importance of science in the many cases that come before our courts. As a consequence I made an effort over the years to continue my education by attending programs that deal with such matters.

I gather that those who would attempt to prevent federal judges from attending such programs believe that those programs are biased towards some particular view with which they do not agree. It is true that such programs sometimes make us aware of ideas and view points that are not "out there" for popular consumption. However, I can say without qualification that the programs that I have attended that were put on by George Mason have featured highly

credentialed academics from the faculties of first rate colleges and universities and/or who have evidenced outstanding scholarship or who have developed new and "cutting edge" ideas within their respective fields. I, and other judges in attendance, have not always agreed with the ideas and viewpoints of the "faculty." Such disagreements lead to lively and interesting discussions, to the great benefit of all.

It is absolutely absurd to believe that federal judges are going to be "brain washed" by anyone, university professors or otherwise. It is the grist of our mill to daily deal with opposing arguments and view points which we must sort out in our effort to reach correct solutions. And, as you know, opposing "expert witnesses" turn up regularly in our trials.

I would hope that the Congress would see the value of encouraging judges to attend such high quality programs whenever their busy dockets will permit them to do so. And I do not think any effort should be made to confine their "education" to in-house programs presented by or sponsored by the Federal Judicial Center (even though the FJC programs are also excellent).

I have no idea where the George Mason Law and Economic Center obtains its revenues but I understand that less than 15% of those revenues come from corporations or corporate foundations. Furthermore, I have no idea who contributes to the Center, it being my understanding that the Center does not disclose its donor lists.

Having attended many of the Center's programs, I can not think of any reasonable question that could be raised concerning the propriety of federal judges participating in those programs. In fact, to repeat, I think that such participation should be encouraged.

The whole idea of restricting the educational opportunities of federal judges is, at the least, extremely problematic. Do you want to attempt to prevent judges from reading books or treatises which are, according to one's view, "too liberal" or "too conservative," or "too controversial"? Setting aside the constitutional issues involved, I hope that Congress will not be persuaded to go down this road.

With best personal regards, I am,

Sincerely yours,

G. Thomas Eisele

P.S. I suggest that the House Committee, if it wants to pursue this, obtain a list of all of the LEC's programs and the "faculties" for those programs. I suggest that this will reassure any doubters as to the quality of those programs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NEW YORK, NEW YORK 10007

THOMAS P. GRIESA
DISTRICT JUDGE

November 14, 2001

Honorable Howard Coble
House of Representatives
2468 Rayburn House Office Building
Washington, DC 20515-3306

Dear Representative Coble:

I understand that the Subcommittee on the Courts is holding hearings on private educational programs for federal judges.

I have attended programs given by the Law and Economics Center going as far back as 1975. For some years these programs dealt solely with various topics in the realm of economics. More recently, the offerings have included more general, philosophical subjects. For instance, in 2000 there was a program in which we read selections from authors such as Locke and Blackstone, who helped to influence the founders of our country. The course was nothing short of inspiring. Last year I attended a course of a more general philosophical nature, which gave very strong emphasis to morality and ethics.

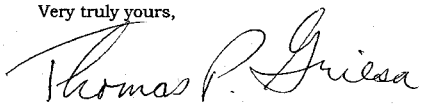
Turning back to the economics courses, I would simply say that we were given the very best in professional economics. The people who attended the courses were obviously of diverse political views. But there was, to my vivid memory, a uniform appreciation for what we were taught.

What may be hard to picture is how hard the judges work at these courses. They tend to be given in resorts, where it is possible to play tennis or golf, or go to the beach. But these are amenities to get some relief from the academic side. The reading assignments are invariably long and difficult, and it is useless to attend the classes without covering at least most of the reading. I have spent day after day getting up at 4:30 in the morning in an attempt to finish the reading before the morning class, having spent hours studying the previous afternoon and evening.

There is no denying that the instruction can convey a point of view. However, as far as the economics is concerned, I would simply characterize the view as strongly favoring the free market, something which is surely mainstream in current America. On the philosophical subjects, the main thing to be said is that the eminent scholars who give the course are faithful in illuminating the great authors they discuss. In any event, I have never felt "indoctrinated," and have on occasion strongly disagreed with the points made by a particular instructor.

I hope that the Congress does nothing to limit the ability of the federal judges to attend such courses.

Very truly yours,



Thomas P. Griesa

bcc: Professor F. H. Buckley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CLARENCE C. NEWCOMER
JUDGE

13TH FLOOR, UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106-1778

November 14, 2001

Honorable Howard Coble
Chairman, House Committee on the Courts
2468 Rayburn House Office Building
Washington, DC 20515-3306

Re: Law and Economics Center,
George Mason University School of Law

Dear Congressman Coble::

When I was appointed to the Federal District Court for the Eastern District of Pennsylvania at Philadelphia in 1972 I had had no college courses dealing with the subject of economics or statistics and related fields.

I soon learned the importance of having a fundamental working knowledge of these subjects in a variety of cases assigned to my docket including cases dealing with racial discrimination, corporate matters and consumer related actions.

As a result I applied for admission to the first seminar given by the Law and Economic Center and was accepted. Since that time I have completed I believe, every seminar course which they have presented over the years.

It is hard for me to believe that there is an organized attack on the efforts of the Law and Economic Center because the courses have been invaluable to me in carrying out my judicial functions. I have never had knowledge as to the corporate or foundation sponsors of the Center, nor was it ever a matter of any concern whatsoever. These courses were all conducted by pre-eminent experts in each field and class lectures and discussions never dealt with a bias one way or the other but concerned themselves solely with the subject matter itself.

Our sessions routinely started early in the morning and frequently went into the afternoon. The balance of the afternoon we would all spend studying the subject matter and at times we had evening sessions as well.

Yes, we did occasionally have dinner at a local restaurant but these matters were all handled with dignity and restraint.

Rather than be subject to attack for its role in conducting these seminars the Law and Economics Center, in my opinion, should be singularly honored for the influence which its courses have had on law schools throughout the United States who eventually embraced the field of economics as a standard part of the law school curriculum.

For your information, I am a senior judge and am rounding out thirty years on the federal bench this coming January. Although a senior judge I carry a full case load with both criminal and civil cases, the same as each active judge.

Thank you for your consideration of this personal reaction.

Sincerely,

C. Newcomer

Clarence C. Newcomer

S. Arthur Spiegel
Senior Judge

Judge's Chambers
United States District Court
For the Southern District of Ohio
838 Potter Stewart U. S. Courthouse
Cincinnati, Ohio 45202

(513) 564-7620
Fax: (513) 564-7627

November 16, 2001

The Honorable Rob Portman
U.S. House of Representatives
Suite 540
8044 Montgomery Road
Cincinnati, Ohio 45236

Dear Rob:

I understand that the George Mason University Law and Economics Center's academic programs are under fire by the House Subcommittee on Courts. I do not believe that you are a member of that subcommittee but you no doubt know some of the members and can pass along my comments. I have attended the Law and Economics seminars over the years and find them of great value. They do not seem to be slanted one way or the other as far as favoring corporations versus consumers or the heavyweights versus the little people. They are quite theoretical and quite valuable in understanding the background of the issues being addressed in the seminars. In summary form the following will give you some information about the Law and Economics Center.

The George Mason Law and Economics Center is an integral part of George Mason University School of Law, whose director and chairman have been full-time law teachers for many years. They alone determine the content of the programs.

Their programs are academic in nature. They are theoretical and not tendentious. Some of the best academics in the world lecture for them.

Support from corporations or corporate foundations account for only thirteen percent of their revenues.

Their programs are held in retreat-like settings in the off-season, and cost less than they would if they held them in the Washington, D.C. area. The facilities they use are comparable to those used by the Federal Judicial Center. Unlike many universities, George Mason University does not have retreat facilities.

Other law schools and universities, at Princeton, New York University, Yale and the University of Virginia, hold programs for judges.

For the last seven years, the LEC has not disclosed its donor list. This policy operates as a "blind trust," in the sense that judges cannot be influenced to benefit a donor if they do not know who the donor is.

Advisory Opinion 67 asks judges to inquire into sources of funding only if "there is a reasonable question concerning the propriety of participation." No such questions arise when the program is an academic one sponsored by a law school.

Could you please pass on my concern, for what it is worth, that nothing be done to disturb the right of federal judges to attend seminars conducted by the various universities and law schools around the country to help us broaden our knowledge and expertise?

Respectfully yours,

S. Arthur Spiegel

bc: Dean Mark F. Grady, Chairman
Professor F.H. Buckley, Director

United States District Court
NORTHERN DISTRICT OF GEORGIA
1618 UNITED STATES COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GEORGIA 30303-3361

JOEL M. FELDMAN
UNITED STATES MAGISTRATE JUDGE

215-1375
(404) 215-1375

November 9, 2001

VIA FACSIMILE: (202) 225-8611

Honorable Howard Coble, Chairman
House Subcommittee on the Courts
2468 Rayburn House Office Building
Washington, DC 20515-3306

Dear Mr. Chairman:

I have been advised that Mr. Doug Kendall of the Community Rights Counsel will soon be testifying before your subcommittee that educational programs made available to members of the federal judiciary such as those put on by the Law and Economics Center of George Mason University should be banned. As I have had the opportunity to attend two seminars in Tucson, Arizona, The Economics of Public Law (October 20-26, 2000), and Science in the Courts (April 27 - May 3, 2001). I feel that my experiences may be of some interest to the subcommittee.

So as to ensure that attendees will obtain the greatest benefits from the lecturers, each attendee is sent a packet of material to read prior to the seminar, which packet includes about 500 pages of monographs, articles, and book excerpts. In accordance with my pledge to George Mason University, I read all of the materials, which I found to be interesting, objective, educational and, insofar as I could tell, non-partisan. Indeed, as I had not had the opportunity to study economics before, I also found that the materials were both educational and fascinating.

Based on my observations of the other attendees, which included Article III Circuit and District Judges, Bankruptcy and Magistrate Judges, they, too, did their homework.

The seminars were also exceptional, with topnotch lecturers, well versed in the respective subject matters covered by their lectures, and experts in their respective fields. In all candor, as could be expected, several were too knowledgeable, making it

difficult for me to follow, but I attribute this to my shortcoming in not completely grasping the study materials. I also felt that the environment where the seminars were conducted aided in the presentations by enabling the attendees to engage in dialog with the lecturers and the other attendees, thereby enhancing the enriching benefits obtained. Indeed, one of the greatest benefits obtained by such seminars is the opportunity to mix and mingle with other jurists, discussing matters of mutual concern.

I also recognize that there are different schools and theories of economics, and the lecturers did not attempt to educate us with respect to possible alternate theories. However, I could not discern any attempt to do anything other than objectively educate us.

Obviously, the next concern is whether attendance at the seminar served a useful purpose: did the education enhance my ability to judge cases? While I feel that the Science in the Courts Seminar was a more direct benefit in adjudicating cases, I also feel that the knowledge I obtained in the field of economics will also have a substantial effect on my ability to understand why and how business decisions are made: matters which may be a substantial, if tangential, part of business type litigation.

To summarize, I received a benefit which will aid me in becoming a better judge, and did not brainwash me to accept one view more than any other.

Very truly yours,

Joel M. Feldman
United States Magistrate Judge
Northern District of Georgia (Atlanta Division)

bcc: Mark F. Grady
Dean and Chairman (via Facsimile)

F. H. Buckley
Professor and Director (via Facsimile)

UNITED STATES DISTRICT COURT
Northern District of New York
206 Federal Building
15 Henry Street
Binghamton, New York 13902

Thomas J. McAvoy
District Judge

November 23, 2001

Hon. Howard Coble
United States House of Representatives
Chairman -
Subcommittee on Courts and Intellectual Property
2468 Rayburn House Office Building
Washington, D.C. 20515

BY FACSIMILE

Dear Mr. Chairman:

As I understand it Doug Kendall of the Community Rights Counsel is going to appear before the House Subcommittee on Courts to argue that the George Mason University programs for Federal Judges should be outlawed.

As I understand it Mr. Kendall charges that the programs are partisan and non-academic and that they are tailored to support narrow corporate interests. Nothing could be farther from the truth. I have attended three weeks of two separate programs and found them to be broad-based, general principles of economics which do not come close to having any agenda or philosophical target. No one attending these lectures could point to any materials which serve any particular corporate interest or corporate interests in general.

I know you are going to listen to both sides of this argument, but I felt it necessary to let you know how I see it. If you have any questions, I will be glad to provide you with testimony or further information.

Very truly yours,

THOMAS J. McAVOY

bcc: Mark F. Grady
Dean and Chairman

F.H. Buckley
Professor and Director

United States District Court
For the Eastern District of Michigan
Theodore Levin United States Courthouse
231 West Lafayette Blvd. Room 651
Detroit, Michigan 48226
(313) 234-5125

CHAMBERS OF
JOHN FEIKENS
DISTRICT JUDGE

November 20, 2001

Hon. John Conyers, Jr.
U.S. Congress Representative
669 Theodore Levin U.S. Courthouse
231 W. Lafayette Blvd.
Detroit, MI 48226

Dear John:

I understand that you are on a Congressional subcommittee which may have before it a hearing on private educational programs for federal judges. I believe the subcommittee is the House Subcommittee on Courts, before which testimony will be presented.

I write to you to say that two years ago I was a guest at the Salish Lodge in Washington State for a Law and Economics Center program sponsored by the George Mason University School of Law. I write to you, John, to advise you that I was not aware of any slanted agenda whatever in the program in which I participated. It was highly academic and non-partisan.

Cordially,

John Feikens
United States District Judge

United States District Court
For the Eastern District of Michigan
Theodore Levin United States Courthouse
231 West Lafayette Blvd. Room 851
Detroit, Michigan 48226
(313) 234-5125

CHAMBERS OF
JOHN FEIKENS
DISTRICT JUDGE

November 20, 2001

Mark F. Grady, Dean and Chairman
George Mason University
Law and Economics Center
School of Law
3301 N. Fairfax Dr.
Arlington, VA 22201

Dear Dean Grady:

In response to your letter of November 8, 2001, enclosed is a copy of a letter I wrote to Congressman John Conyers.

Sincerely yours,

John Feikens
John Feikens
United States District Judge

encls.

Yale Law School

ANTHONY T. KRONMAN · *Dean*

November 13, 2001

Professor F. H. Buckley
George Mason University
Law and Economics Center
School of Law
3301 North Fairfax Drive
Arlington, VA 22201-4498

By fax (703) 993-8181

Dear Professor Buckley:

Thank you very much for your letter of November 9th. I intend to place a copy of my letter of September 21st, 2000 on file with the House Subcommittee on the Courts. Unless the Kerry-Feingold plan has been changed in substantial ways, I continue to think it a bad idea, for the reasons expressed in my letter.

Sincerely,

THE CATHOLIC UNIVERSITY OF AMERICA

School of Law
Office of the Dean
Washington, D.C. 20064-8005
202-319-5139
Fax 202-319-5473

Douglas W. Kmiec
Dean & St. Thomas More Professor

November 13, 2001

The Honorable Henry J. Hyde
United States House of Representitives
2110 Rayburn House Office Building
Washington, DC 20515-1306

Re: Kerry-Feingold – educational programs available to judges.

Dear Mr. Chairman:

The very nature of our government is derived from the Lockean observation that no man can be a judge in his own case. Therefore, all of us must necessarily support the proposition of an "unbiased and fair-minded judiciary." The constitutional promise of life appointment and nondiminution of salary likewise ensure valued judicial independence of mind.

But an independent mind is not an uninformed one. For decades the Law & Economics Center [LEC] of George Mason University has been offering as a public service cost-free seminars on economics to federal judges and law professors. I, myself, was the beneficiary of such a program nearly two decades ago, and found it to be rigorous, informative, and stimulating of thought. How could it not be? It was taught by a Nobel prize winning economist and others of like teaching and scholarly character. Today, I am informed that the LEC offers programs from the philosophy of Aristotle to American History, again taught by some of the best intellects and historians in the land.

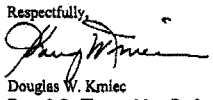
I write in support of allowing federal judges the continued freedom to take advantage of these opportunities for both intellectual enrichment and conversation with America's university scholars. The proposed Kerry-Feingold legislation that would preclude or drastically limit these opportunities subject to the prior restraint of government agency review is contrary to the ideals of our First Amendment and just plain good sense. Judges should decide for themselves which seminars and other educational opportunities sponsored by private or public universities as well as bona fide not for profit educational centers and associations, they wish to pursue. The Kerry-Feingold legislation designed to place the Federal Judicial Center in the awkward position of censor is unwise and unneeded.

The Federal Judicial Center does a splendid job educating judges in the particular aspects of the judicial function. Yet, judges are not invisible to the larger culture. Rather, they are important expressions of its judgment, and private universities and centers like the LEC have always played a vital role in bringing judges into contact with the best scholarship about our life together.

Existing codes of ethics properly restrict judges from accepting benefits from parties to litigation, and financial disclosure rules ensure that all know what seminars judges have attended. Most importantly, the LEC does *not* disclose its donor list. If Congress has any role in this area, it would be to ensure that the existing standards and this last ethical precept is followed by all, but not to prohibit or limit freedom of attendance more broadly.

Thank you for the opportunity to present these views to the subcommittee.

Respectfully,



Douglas W. Kmiec
Dean & St. Thomas More Professor

THE WALL STREET JOURNAL.

VOL. CCXXXVI NO. 80 EE/WO ★★★ TUESDAY, OCTOBER 24, 2000 WSJ.com

Congress Dumbs Down Judges

A distinguished legal program at a major university has been holding seminars for federal judges for 13 years. Its faculty has included six Nobel Laureates, and scholars such as James Q. Wilson and Harvey Mansfield. But because it effectively teaches judges how to apply economic analysis in the courtroom, liberal groups are trying to attach an amendment to the appropriations bills now before Congress that would effectively gut the program.

More than 550 federal judges have voluntarily attended one-week courses offered by the Law & Economics Center of George Mason University. This year, 37% of the judges attending were appointed by President Clinton. That's what apparently worries liberals. They're pushing a bill by Senators John Kerry and Russ Feingold that would prohibit judges from going to a privately funded seminar unless it was approved by judicial bureaucrats in Washington.

Russ Feingold

The Environmental Working Group maintains the conferences are "a way for corporations to reach out to judges," noting that centers like George Mason have accepted corporate funds. But the judges are never told who paid for the seminars. "I can't be influenced by something I don't know," says Ralph Guy Jr., a U.S. Court of Appeals judge. The Committee on Codes of Conduct, made up of 15 federal judges, says judges can "with propriety" attend free seminars so long as they disclose them.

But in the dumbed-down Brave New World of judicial conferences that liberals want, judges couldn't attend seminars put on by George Mason, or for that matter New York University, the American Bar Association or the American Trial Lawyers Association. A federal judge would have to pay out-of-pocket unless the seminar was approved by the Federal Judicial Center, which would have an annual limit of $2 million in expenses to reimburse all federal judges.

This would effectively set up a competition between all groups holding legal seminars for a scarce pool of federal dollars available to pay expenses. Frank Buckley, who directs George Mason's program, is willing to bet his more philosophical curriculum will either not be approved by the feds or will lose out to more procedural, "how-to" programs.

There is good reason for judges to attend the programs of George Mason and other groups. Most federal judges graduated from law school before economic analysis became an important part of cases involving antitrust, contract law, tort law and securities regulation. Law and economics courses are now featured at all major law schools, but many judges have never taken one.

The courses are top quality. Nobel laureates Milton Friedman, James Buchanan, Gary Becker and Paul Samuelson have all lectured more than once for George Mason. Judges have their travel, room and board reimbursed, but no leisure activities are part of the program.

The Judicial Conference, which represents all federal judges, came out last month in opposition to the Kerry-Feingold bill. Judge Ralph Winter, chairman of its executive committee, called the bill "an interference in the marketplace of ideas" that would turn the Federal Judicial Center "into a censor." For that matter, it strikes us as a rather ironic infringement of the judiciary's First Amendment rights. And to call to mind the phenomenon of "fact-finding" Congressional junkets makes the proposal risible.

Judges of all persuasions agree on the seminars' value. As Supreme Court Justice Ruth Bader Ginsburg wrote to George Mason after participating in two of its seminars: "For lifting the veil on such mysteries as regression analysis, and for advancing both learning and collegial relationships among federal judges, my enduring appreciation." It's ironic that in the case of judicial seminars the Democrats are in danger of becoming the anti-education party.

Federal Bar Association
Office of the President

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December 4, 2001

The Honorable Howard Coble
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
B351A Rayburn House Office Building
Washington, D.C. 20515

Re: November 29, 2001 Subcommittee Oversight Hearing
"The Operations of Federal Judicial Misconduct and Recusal Statutes"

Dear Mr. Chairman:

On November 29, 2001, the Subcommittee on Courts, the Internet and Intellectual Property convened an oversight hearing on "The Operations of Federal Judicial Misconduct and Recusal Statutes." One topic raised was judges' attendance at privately-funded seminars. The Federal Bar Association ("FBA") appreciates the opportunity to supplement the hearing record on that issue.

The FBA – founded over 80 years ago, with more than 15,000 members in 100 chapters across the country – is the only national association of private and government lawyers devoted primarily to improving the effectiveness of the federal courts and agencies.

At its mid-year meeting on March 24 of this year, the FBA's 250-member policy-making body – the FBA National Council – unanimously adopted Resolution No. 01-02 (copy enclosed) opposing the "Judicial Education Reform Act of 2000" (the "Kerry-Feingold Bill"), S. 2990, and any similar legislation banning judges' attendance at privately-funded seminars.

The National Council's resolution endorsed the position set forth in a February 9, 2001 letter from FBA President Robert McNew to Senators Kerry and Feingold (copy enclosed). Echoing reservations previously voiced by Chief Justice Rehnquist, the Judicial Conference of the United States, the Board of the Federal Judicial Center ("FJC"), and the Federal Judges Association, the FBA's March 24 resolution reflects

concerns that the proposed ban is overly broad, would have unintended consequences, raises a number of serious constitutional issues, would mandate an inappropriate censorship role for the FJC, and has not been adequately studied.

In today's complex and rapidly-changing world, the continued ability of the federal courts to deliver the highest caliber of justice depends on a judiciary that is up-to-date on the latest developments in areas such as technology, bio-ethics, economics and globalization. But, even as the cases before judges have become more and more complex (and thus the need for judicial education greater and greater), Congress has appropriated less and less money for the FJC, the educational arm of the judiciary. Over the past decade, the real amount of funding for the FJC has actually declined. The FJC's appropriation for FY 1992 was $18,895,000 (in 1992 dollars); and its FY 2001 appropriation – nine years later – was actually *lower*: only $18,736,000 (in 2001 dollars).

Recognizing the country's vital interest in a well-educated federal bench and the critical role that privately-funded seminars have played in recent years as a means of supplementing FJC programming, the FBA recently reaffirmed its position on judicial education by adding to its Issues Agenda for Fiscal Year 2002 support for "[e]xpansion of and enhanced federal funding for continued legal education and training programs for the federal judiciary."

In short, litigants and lawyers alike are best served by federal judges who are current on the most pressing issues of the day. Judges today need more opportunities for education than ever before. Placing restrictions on the learning process would be counterproductive to the public's interest in a well-informed judiciary.

The FBA appreciates the opportunity to be heard on this issue, and looks forward to working with the Subcommittee on this and other matters of mutual concern. Please let us know if we can be of further assistance.

Sincerely,

Russell Del Toro
National President

Enclosures

cc: The Honorable Howard Berman
The Honorable Chief Justice William H. Rehnquist
The Honorable William L. Osteen
The Honorable John F. Kerry
The Honorable Russ Feingold
Douglas Kendall

Federal Bar Association
Office of the President

ROBERT A. MCNEW
Eaton Corporation
1111 Superior Avenue
Cleveland, OH 44114
216.523.4125 • 216.479.7110 (fax)
bobmcnew@eaton.com

February 9, 2001

The Honorable John F. Kerry
United States Senate
Washington, D.C. 20510-2102

The Honorable Russell D. Feingold
United States Senate
Washington, D.C. 20510-4904

Re: Judicial Education Reform Act of 2000

Dear Senators Kerry and Feingold:

On behalf of the 15,000 members of the Federal Bar Association ("FBA") nationwide, I am writing to express our strong opposition to reintroduction of the Judicial Education Reform Act of 2000, S. 2990 ("the Kerry-Feingold bill") in the 107th Congress.

The FBA – founded some 80 years ago, with more than 100 chapters across the country -- is the only national association of private and government lawyers devoted exclusively to improving the effectiveness of the federal courts and agencies. We are convinced that litigants and lawyers alike are best served by federal judges who are educated on the most pressing issues of the day. Placing restrictions on the learning process would be counterproductive to the public's interest in a well-informed Judiciary.

Although the FBA represents a rather different constituency, our reservations about the Kerry-Feingold bill generally echo those of the Judicial Conference of the United States, the Board of the Federal Judicial Center ("FJC"), and the Federal Judges Association. In short, the legislation is overly broad; would have unintended consequences; raises a number of serious constitutional issues; would mandate an inappropriate censorship role for the FJC; and has not been adequately studied.

While the FBA appreciates – and, indeed, shares – the interests of Congress in ensuring that all public servants avoid even the appearance of conflicts of interest, we believe that those interests are adequately protected by existing law, including the requirements of the Ethics Reform Act of 1989 and the canons of the Judicial Code of Conduct.

As introduced in the last Congress, the Kerry-Feingold bill would prohibit federal judges from accepting "anything of value" (including tuition, course materials, meals, and travel and lodging expenses) from any non-governmental source in connection with a "seminar" (which is

defined broadly to include "panel discussions, conferences, colloquia, symposia, and other similar events"). The bill would authorize for five years an annual $2 million Judicial Education Fund, which could be used to cover judges' expenses for attendance at privately-sponsored judicial education programs – but only those programs expressly approved by the Board of the FJC, which would be charged with evaluating such programs based on consideration of program content, as well as the funding and litigation activities of sponsors and presenters, "to ensure that . . . [approved] seminars . . . are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary."

The Kerry-Feingold bill was prompted by a July 2000 report by a private D.C.-based organization, which criticized judges' attendance at privately-sponsored educational programs. Focusing particularly on programs presented by what it termed the "Big Three" (the Law & Economics Center at George Mason University School of Law, the Liberty Fund, and the Foundation for Research on Economics and the Environment), the gravamen of the report was that "the marketplace of privately funded judicial education is overwhelmingly dominated by pro-market, anti-regulatory seminars" presented by organizations assertedly sharing an "extreme, conservative/libertarian ideology." *Nothing For Free: How Judicial Seminars Are Undermining Environmental Protections and Breaking The Public's Trust* ("July 2000 Report" or "Report") at 2.

Supporters of the Kerry-Feingold bill have characterized privately-sponsored judicial education programs as "junkets" or "sophisticated bribes." But, in fact, such programs fulfill for judges much the same educational purposes as the fact finding missions that are often undertaken by members of Congress – and which are sometimes funded, at least in part, by corporate interests through foundations and institutes – to familiarize legislators with particular issues or problems, or regions of the world. The actions of Congress affect the lives of Americans, just like the decisions of judges. To ensure the integrity of government decisionmaking, all three branches of government have stringent ethics laws. And the ethics laws governing the Judiciary are already the most stringent of all.

For example, under the Ethics Reform Act of 1989, federal judges are permitted to attend non-government sponsored seminars, but may accept reimbursement only for their actual out-of-pocket expenses. In addition, judges must file annual financial disclosure reports, expressly listing such reimbursements from universities, bar associations, educational foundations, and any other non-governmental sources. Those reports are open to public scrutiny. Further, existing legal and ethical provisions already preclude judges from accepting anything of value from parties in litigation before them, and require a judge's recusal in any case where his or her impartiality might reasonably be questioned.

There can be no concern that privately funded seminars may serve as vehicles for *ex parte* communications between parties to litigation and the judges hearing their cases. Such a scenario would be plainly prohibited by existing law. Rather, the fundamental concern

expressed in the July 2000 report is a more generalized one – that the existing privately-sponsored judicial seminars are "breeding a new conservative judicial activism." Report at 2. Thus, the report's real complaint is about program *content*. Implicit in that concern is the fear that judges are not capable of detecting bias in arguments, and are not able to sift through differing opinions and reach their own independent conclusions. But that goes to the very heart of the judicial function. By selection, training, and experience, judges have great capacity to "filter" competing arguments and opinions and to determine what weight to accord them.[1] That is the very role that the Senate – and society itself – has entrusted to them, and that is the function that they perform every day.

Premising legislation on concerns about program content raises constitutional issues as well. Clearly, the First Amendment prohibits Congress from *directly* regulating or limiting the ideas and perspectives to which judges are exposed. Instead, the Kerry-Feingold bill would seek to accomplish that goal *indirectly* – by using the power of the purse strings. It is far from clear whether Congress can constitutionally accomplish by the back door what it cannot do through the front door.

Nor is the First Amendment the only provision of the Constitution implicated here. The Constitution provides for a Judiciary that is above politics, and independent of the control of both Congress and the Executive Branch. It would be wholly inappropriate for Congress to attempt to limit the topics and perspectives presented to the Judiciary – a co-equal branch of government. If Congress begins to dictate what judges can hear and from whom, the principles of separation of powers and judicial independence will be endangered.

Another misconception underpinning the July 2000 report is that the FJC is capable of meeting all the continuing legal education needs of the federal judiciary. Regrettably, that is not the case. The report concedes the importance of continuing education for judges:

> [J]udges must now routinely decide cases that turn on inordinately complicated scientific and technological questions. Keeping up with today's rapid pace of change is not easy for anyone, and for some judges the task is compounded by the fact that they have been out of school for many decades. Yet, to decide cases fairly, it is imperative for judges to keep current with legal, scientific and technological trends. What was good science or cutting edge technology only five years ago is often completely outdated today and occasionally considered wrong.

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[1]As Advisory Opinion No. 67, issued by the Judicial Conference's Committee on the Codes of Conduct, notes: "The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and trained to weigh them."

Report at 5. But, even as the cases before judges have become more and more complex (and thus the need for judicial education greater and greater), Congress has appropriated less and less money for the FJC.

The numbers speak for themselves. The FJC's appropriation for FY 1992 was $18,895,000 (in 1992 dollars); and its FY 2001 appropriation – nine years later – is actually *lower*: only $18,736,000 (in 2001 dollars). By any measure, Congress' funding for FJC programming has decreased. Over the years, Congress has been requiring the FJC to do more and more, with less and less. The FJC has struggled to stretch its scarce resources, by reducing the frequency of on-site workshops and seminars for judges, and experimenting with greater use of distance learning – particularly through the Federal Judicial Television Network ("FJTN"). But one judge sitting alone in a courthouse conference room viewing a lecture on closed-circuit TV is a poor substitute for the animated give-and-take exchanges among the faculty and groups of judges that typify the FJC's on-site workshops and seminars (as well as the judicial education programming offered by non-governmental organizations).

Moreover, the FJC is charged with continuing education and training for all personnel of the judicial branch – not just judges. While the July 2000 report emphasizes that the FJC sponsored 843 programs in 1998, it also concedes that a mere 69 of those were designed specifically for judges. Report at 6. The current issue of the "FJTN Bulletin" – which promotes the FJC programming for the months of February and March – drives home that point. (A copy is enclosed, for ease of reference.) The bulletin does feature several exciting new substantive programs targeting judges. But, as even a casual review of the bulletin illustrates, the great majority of the FJC programming addresses administrative issues and/or is designed for staff-level personnel. This is understandable. Particularly given its limited resources, it is simply cost-prohibitive for the FJC to even attempt to duplicate the variety and quality of the non-government sponsored training programs that judges today rely on to stay up-to-date on important developments in law, economics, science and technology.

Indeed, as introduced in the last Congress, the Kerry-Feingold bill would not only preclude judges from participating in programs funded by corporate entities or private foundations; it would also ban judges' attendance at educational programs sponsored by all other non-governmental organizations (such as, *e.g.*, universities, law schools, and bar associations, including the Federal Bar Association) – unless either the judges paid their own tuition and expenses, or the FJC specifically approved the program and paid the expenses from the limited funds that the bill would set aside for that purpose.[2]

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[2]The legislation would also jeopardize the FJC's ability to co-sponsor seminars with law schools and other organizations – something it has recently begun to do, in an effort to make its dollars go further.

The bill thus would fundamentally alter the mission of the FJC, transforming it from a designer and presenter of judicial education programs, to an investigator and evaluator of outside education programs trying to determine whether those programs are "conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary." In essence, the bill would cast the FJC in the role of censor. As the Chief Justice put it, in his 2000 Year-End Report on the Federal Judiciary:

> The assignment to the FJC Board – or to any government board – of authority that is tantamount to deciding what seminars or educational meetings federal judges may attend – and to decide it under the extraordinarily vague standard [specified in the bill] . . . – has most of the elements commonly associated with government censorship.

The Chief Justice invoked Justice Holmes' famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), which captures the point in a nutshell: "[T]he ultimate good desired is better reached by free trade in ideas" than by censorship.

In short, while the goal of the Kerry-Feingold bill – ensuring the integrity of the judiciary -- is laudable and beyond dispute, the introduction of *any* legislation on the subject of continuing legal education for judges would be premature at this time. The more prudent course is to convene Congressional hearings on the broader topic, and to study and review any proposals advanced there.

Thank you for your consideration of the FBA's views on this matter. Please contact me (216) 523-4125 if you have any questions, or if we may be of further assistance on this or any other issue of mutual concern.

Sincerely yours,

Robert A. McNew
President

Enclosure

cc (w/o Encl.): The Honorable William H. Rehnquist, Chair
Federal Judicial Conference

Leonidas Ralph Mecham, Director
Administrative Office of the U.S. Courts

The Honorable Fern M. Smith, Director
Federal Judicial Center

THE FEDERAL BAR ASSOCIATION
RESOLUTION NO. 01-02

OPPOSITION TO KERRY-FEINGOLD BILL

WHEREAS, the Kerry-Feingold bill, the Judicial Education Reform Act of 2000 (S. 2990), introduced in the 106th Congress, is overly broad in its application because it would prohibit the attendance of federal judges, with few exceptions, at seminars sponsored by colleges and universities, bar associations, nonprofit charities, foundations and institutes, private individuals, and even state or local government agencies, which provide federal judges with a needed and otherwise unavailable valuable source of continuing education on complex matters;

WHEREAS, the bill would unduly and inappropriately impose upon the Federal Judicial Center Board a censorship role when deciding which seminars federal judges may attend;

WHEREAS, the bill may impose additional financial burdens upon the Federal Judicial Center, whose resources are already insufficient to address the continuing education needs of the federal judiciary;

WHEREAS, the Federal Judicial Center, in fulfilling its duty to provide for the continuing legal education of the federal judiciary, necessarily relies upon the large number of seminars offered by educational institutions, bar associations, non-profit organizations, foundations and institutes, governmental entities, and private individuals;

NOW THEREFORE BE IT RESOLVED that the Federal Bar Association opposes the Kerry-Feingold legislation (S. 2990) as introduced in the 106th Congress, and urges Congress to refrain from taking further action on similar legislation in the 107th Congress until there has been an opportunity for further consideration, including Congressional hearings and public comment; and

BE IT FURTHER RESOLVED that the President of the Federal Bar Association is authorized and directed to transmit copies of this resolution to the President, the Congress and other appropriate officials.

Approved by the National Council of the Federal Bar Association on March 24, 2001, in Washington, D.C.

REPORT OF RESOLUTION

OPPOSITION TO PROPOSED KERRY-FEINGOLD BILL

On July 27, 2000, Senators John Kerry (D-Massachusetts) and Russell Feingold (D-Wisconsin) introduced S. 2990, the Judicial Education Reform Act of 2000. This bill sought to amend the Ethics Reform Act of 1989 by attempting to ban federal judges and justices from attending privately-funded seminars by prohibiting the judges from accepting direct reimbursement of their expenses (food, travel, and/or lodging) from the sponsors of those seminars. Simultaneously, the bill authorized, as a substitute for this private funding, a Judicial Education Fund of $2 million per year for five years which could be provided to private sponsors of judicial education seminars to pay the expenses of attending judges. Furthermore, the Board of the Federal Judicial Center would be given the responsibility to review proposed attendance at all seminars. This Board, using Judicial Conference guidelines, could approve for attendance only those "seminars that are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary." This bill died in last year's Congress, but it is anticipated that it will be re-introduced later this year.

The sponsors of this bill, relying on recent reports from the public interest law firm, Community Rights Counsel, assert that there are reports of federal judges attending legal seminars sponsored by corporations, foundations, and individuals which have one-sided legal agendas which are designed to advance their private interests. It is alleged that in some instances, these judges attended seminars while relevant cases were pending before their courts. Recognizing that the judiciary must avoid the appearance of conflict of interest as fastidiously as it avoids conflict, the sponsors were motivated to introduce a bill that prohibits judges from accepting private seminars as gifts.

While appreciating the sponsors' interest that all public servants, and particularly judges, strictly adhere to ethical conduct, there are a number of significant opponents to this bill, including the Federal Judges Association, the Board of the Federal Judicial Center, the Judicial Conference of the United States, and, most significantly, the Chief Justice of the United States Supreme Court. All of these critics condemn this legislation as being too broad in its application in that it would not only prohibit attendance at seminars sponsored by corporate entities, and private interest groups, but also seminars sponsored by colleges and universities, bar associations, nonprofit charities, private individuals, and even state or local government agencies. The availability of this multitude of seminars is critical to the judges' need for continuing education on complex matters in the rapidly changing fields of science, technology, and economics. Secondly, the legislation raises constitutional concerns because it will give to the Federal Judicial Center Board an inappropriate censorship role in that it must decide, by some extraordinarily vague standards, what seminars or educational meetings federal judges may attend. Thirdly, there is no need for this legislation because existing legal and ethics provisions found in the Ethics Reform Act of 1989 and the canons of the Judicial Code of Conduct properly limit judges from accepting gifts from parties to litigation before them and provide for disqualification of judges when questions of impartiality arise. Fourth,

the legislation may unduly tax the financial resources of the Federal Judicial Center, especially if funding for the Judicial Education Fund, as proposed by the legislation, offsets current funding for the Center. Lastly, for over 30 years, the Federal Judicial Center has admirably provided for continuing legal education for judges; however, because of its limited resources, it has relied upon law schools, bar associations, and other private organizations to supplement its offering of seminars on a broad range of topics. The Federal Judicial Center's continuing legal education would suffer mightily if this source of programs were eliminated.

This proposed legislation appears to have been hastily assembled without the benefit of input from the organizations and individuals who will suffer the greatest impact. Therefore, the Judiciary Division and the Federal Litigation Section ask the National Council to approve the enclosed resolution which opposes legislation patterned after, or identical to, S. 2990 – the Kerry-Feingold Judicial Education Reform Act of 2000.

United States District Court
Southern District of Georgia
Savannah, Georgia 31412

B. Avant Edenfield
Judge

Post Office Box 9865
(912) 650-4060

November 19, 2001

FAXED TRANSMISSION

House Subcommittee on the Courts, the Internet and Intellectual Property

Re: George Mason University
Law and Economics Center

Congressman Howard Coble, Chairman

Phone: 202-225-3065 / Fax: 202-225-8611

Dear Congressman:

The attack, by Mr. Doug Kendall of the Community Rights Counsel, is ill-founded. On three occasions, I have had the opportunity to attend programs sponsored by the George Mason Law and Economics Center, that dealt with economic issues. They were excellent! In addition, last year I attended a two-day seminar in Alexandria, Virginia, studying John Stewart Mills' On Liberty. How can this be a bad thing for judges?

Never has anyone indicated, directly or indirectly, that I should be beholden to a particular benefactor, nor have I detected any biases in their programs.

These programs are not entirely free, yet I have thought they were immensely valuable, so I have spent personal funds so that I could attend them with my wife. Please register my objections to Mr. Kendall and other attack.

Sincerely,

B. Avant Edenfield

BAE/ddb

UNITED STATES BANKRUPTCY COURT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
SUSAN PIERSON SONDERBY
CHIEF JUDGE

(312) 435-5646

November 19, 2001

via fax

Honorable Howard Coble
United States Congress

Dear Congressman Coble:

I am writing to you as an alumnae of the George Mason Law & Economics Center's academic program for judges to ask for your support of their programs. I am advised that Doug Kendall from the Community Rights Counsel will argue before the House Subcommittee on the Courts on Wednesday that the George Mason programs should be banned.

There are several reasons these programs should be continued. Judges throughout their lives should continue to be educated in not only their own discipline, but in areas outside of their disciplines. These classes are taught by Nobel laureates and the nation's leading intellectuals. Each judge attending commits to reading hundreds of pages in preparation for each day's classes.

I personally have used some of what I've learned in analyzing evaluation issues that come before me. Bankruptcy judges continuously have to value assets for different purposes throughout the case.

Mr. Kendall implies that the programs are partisan and non-academic, and that they serve narrow corporate interests. I have carefully scrutinized the presentations and have been

totally unable to find any biases or that they may be influencing how judges think. (I also believe that judges are fully able to screen through any biased or partisan material. In fact, that is what we do on a daily basis.) I don't know what Mr. Kendall deems non-academic. I have also been unable to find any corporate agenda. I know that 13 percent of the George Mason funding for these programs comes from corporations or corporate foundations, but I have no idea which corporations or foundations would make up that list.

Additionally, the Federal Judicial Center which has the responsibility for educating judges, has reduced the amount of training to once every 18 months because of lack of funding. In the past, we had training seminars on a yearly basis.

In sum, I feel strongly about the continuation of the George Mason Law & Economics Center's academic programs for judges. I certainly have been enriched by them.

Very truly yours,

UNITED STATES BANKRUPTCY COURT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
SUSAN PIERSON SONDERBY
CHIEF JUDGE

(312) 435-5646

November 19, 2001

via fax

Honorable Howard Coble
United States Congress

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In sum, I feel strongly about the continuation of the George Mason Law & Economics Center's academic programs for judges. I certainly have been enriched by them.

Very truly yours,

bc: John P. Giacomini

Same letter has been faxed to:

Hon. Henry Hyde
Hon. Elton Gallegly
Hon. Bob Goodlatte
Hon. William Jenkins
Hon. Asa Hutchinson
Hon. Chris Cannon
Hon. Lindsey Graham
Hon. Spencer Bachus
Hon. Joe Scarborough
Hon. John Hostettler
Hon. Ric Keller

Hon. Howard Berman
Hon. John Conyers
Hon. Rick Boucher
Hon. Zoe Lofgren
Hon. William Delahunt
Hon. Robert Wexler
Hon. Maxine Waters
Hon. Martin Meehan
Hon. Steve Rothman
Hon. Tammy Baldwin

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
FEDERAL COURTHOUSE
101 HOLMES AVENUE, N.E.
HUNTSVILLE, ALABAMA 35801

CHAMBERS OF
C. LYNWOOD SMITH, JR.
JUDGE

November 21, 2001

Honorable Spencer T. Bachus, III
United States House of Representatives
442 Cannon Building
Washington, D.C. 20515

Dear Congressman Bachus:

I am informed that representatives of an organization called the "Community Rights Counsel" have appeared before the House Subcommittee on the Courts for the purpose of asking that educational programs for federal judges sponsored by George Mason University's Law & Economics Center be banned.

Unfortunately, I have been away from Huntsville for much of the past few weeks, in my Birmingham Chambers and Courtroom, and only now have had an opportunity to respond to this attack. I hope this letter does not come too late to have some influence on your thought process.

I am not familiar with the so-called "Community Rights Counsel" or its purposes, but I do know something about George Mason's Law & Economics Center. I attended one seminar sponsored by that organization. The subject was "Liberty and Virtue in Early American Thought," and it was held from June 9 through 15, 2000, in Santa Fe, New Mexico.

I can describe that seminar in one sentence: It was the most extraordinary, and intellectually challenging, educational experience since the end of college and law school.

We read and discussed books and extracts from writings by such persons as Locke, de Tocqueville, Washington, Adams, Madison, Hamilton, and Jefferson, among others.

Advisory ethical opinions require that I inquire into the sources of funding for educational programs if there is a reasonable question concerning the propriety of my participation. Based on my personal experience, I have no such questions. There was nothing "partisan" about this program, unless one entertains the perverted opinion that an academic examination of the philosophical foundations of the American Revolution and our Constitution exhibits, in some pejorative sense, a bias that might be reflected in a judicial opinion.

Quite frankly, the whole notion that George Mason University's Law & Economics Center is tendentiously promoting a particular political agenda is ridiculous. The judges who attended the Santa Fe program were nominated by Democratic and Republican Presidents, and each held strong individual opinions, ranging from "conservative" to "liberal," with numerous gradations along the continuum between those poles. Our discussions often turned into debates that were lively, informative, and intellectually refreshing. The whole experience was so provocative that, in the past year, I have purchased no less than twenty books on the Revolutionary period, and read myself to sleep each night. I have not utilized an extract from any one of them in an opinion, but I certainly have grown in the depth and breadth of my appreciation for the truly extraordinary accomplishments of the founding generation of this nation that I am immensely proud to serve.

For all of these reasons, I sincerely hope that you will give careful consideration to preserving the opportunity for members of the federal judiciary to participate in future educational programs sponsored by this institution.

Very truly yours,

C. Lynwood Smith, Jr.

Federal Bar Association

Office of the President

ROBERT A. McNEW
Ernst Corporation
1111 Superior Avenue
Cleveland, OH 44114
216.523.4125 • 216.479.7110 (fax)
bobmcnew@ernst.com

February 9, 2001

Leonidas Ralph Mecham, Director
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: **Judicial Reform Act of 2000**

Dear Director Mecham:

Enclosed, for your information, is a copy of a letter to Senators Kerry and Feingold, written on behalf of the 15,000 members of the Federal Bar Association ("FBA") nationwide, expressing our strong opposition to reintroduction of the Judicial Education Reform Act of 2000 ("the Kerry-Feingold bill") in the 107th Congress.

As you know, the FBA – founded some 80 years ago, with more than 100 chapters across the country – is the only national association of private and government lawyers devoted exclusively to improving the effectiveness of the federal courts and agencies. As the enclosed letter indicates, we are convinced that litigants and lawyers alike are best served by federal judges who are educated on the most pressing issues of the day. Placing restrictions on the learning process would be counterproductive to the public's interest in a well-informed judiciary.

The FBA's reservations about the Kerry-Feingold bill generally echo those of the Judicial Conference of the United States, the Board of the Federal Judicial Center ("FJC"), and the Federal Judges Association. In short, the legislation is overly broad; would have unintended consequences; raises a number of serious constitutional issues; would mandate an inappropriate censorship role for the FJC; and has not been adequately studied.

While the FBA appreciates – and, indeed, shares – the interests of Congress in ensuring that all public servants avoid even the appearance of conflicts of interest, we believe that those interests are adequately protected by existing law, including the requirements of the Ethics Reform Act of 1989 and the canons of the Judicial Code of Conduct.

Continuing education for judges is more important now that ever, as judges today must rule on complex matters in rapidly-changing fields such as science, technology and economics. Judges' attendance at programs to educate them on such matters should not be restricted simply because the programs espouse some particular perspective. We concur in the views of the Judicial Conference's Committee on the Codes of Conduct:

> The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and trained to weigh them.
>
> Advisory Opinion No. 67.

Implicit in the Kerry-Feingold legislation is a fear that judges are not capable of detecting bias in arguments, and are not able to sift through differing opinions and reach their own independent conclusions. But that goes to the very heart of the judicial function. By selection, training, and experience, judges have great capacity to "filter" competing arguments and opinions and to determine what weight to accord them. That is the very role that the Senate – and society itself – has entrusted to them, and that is the function that they perform every day.

Charging the FJC – or any other governmental body – with responsibility for determining which educational programs are appropriate for federal judges and which are not (particularly under the amorphous standard articulated in the Kerry-Feingold bill) is unnecessary, and tantamount to censorship. The Chief Justice's 2000 Year-End Report invoked Justice Holmes' famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), which captures the point in a nutshell: "[T]he ultimate good desired is better reached by free trade in ideas" than by censorship.

While the goal of the Kerry-Feingold bill – ensuring the integrity of the judiciary – is laudable, the FBA believes that the introduction of *any* legislation on the subject of continuing legal education for judges would be premature at this time. The more prudent course would be to convene Congressional hearings on the broader topic, and to study and review any proposals advanced there.

Sincerely yours,

Robert A. McNew
President

Enclosure

Federal Bar Association

Office of the President

ROBERT A. MCNEW
Eaton Corporation
1111 Superior Avenue
Cleveland, OH 44114
216.523.4125 • 216.479.7110 (fax)
bobmcnew@eaton.com

February 9, 2001

The Honorable John F. Kerry
United States Senate
Washington, D.C. 20510-2102

The Honorable Russell D. Feingold
United States Senate
Washington, D.C. 20510-4904

Re: Judicial Education Reform Act of 2000

Dear Senators Kerry and Feingold:

On behalf of the 15,000 members of the Federal Bar Association ("FBA") nationwide, I am writing to express our strong opposition to reintroduction of the Judicial Education Reform Act of 2000, S. 2990 ("the Kerry-Feingold bill") in the 107th Congress.

The FBA – founded some 80 years ago, with more than 100 chapters across the country -- is the only national association of private and government lawyers devoted exclusively to improving the effectiveness of the federal courts and agencies. We are convinced that litigants and lawyers alike are best served by federal judges who are educated on the most pressing issues of the day. Placing restrictions on the learning process would be counterproductive to the public's interest in a well-informed Judiciary.

Although the FBA represents a rather different constituency, our reservations about the Kerry-Feingold bill generally echo those of the Judicial Conference of the United States, the Board of the Federal Judicial Center ("FJC"), and the Federal Judges Association. In short, the legislation is overly broad; would have unintended consequences; raises a number of serious constitutional issues; would mandate an inappropriate censorship role for the FJC; and has not been adequately studied.

While the FBA appreciates – and, indeed, shares – the interests of Congress in ensuring that all public servants avoid even the appearance of conflicts of interest, we believe that those interests are adequately protected by existing law, including the requirements of the Ethics Reform Act of 1989 and the canons of the Judicial Code of Conduct.

As introduced in the last Congress, the Kerry-Feingold bill would prohibit federal judges from accepting "anything of value" (including tuition, course materials, meals, and travel and lodging expenses) from any non-governmental source in connection with a "seminar" (which is

defined broadly to include "panel discussions, conferences, colloquia, symposia, and other similar events"). The bill would authorize for five years an annual $2 million Judicial Education Fund, which could be used to cover judges' expenses for attendance at privately-sponsored judicial education programs – but only those programs expressly approved by the Board of the FJC, which would be charged with evaluating such programs based on consideration of program content, as well as the funding and litigation activities of sponsors and presenters, "to ensure that . . . [approved] seminars . . . are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary."

The Kerry-Feingold bill was prompted by a July 2000 report by a private D.C.-based organization, which criticized judges' attendance at privately-sponsored educational programs. Focusing particularly on programs presented by what it termed the "Big Three" (the Law & Economics Center at George Mason University School of Law, the Liberty Fund, and the Foundation for Research on Economics and the Environment), the gravamen of the report was that "the marketplace of privately funded judicial education is overwhelmingly dominated by pro-market, anti-regulatory seminars" presented by organizations assertedly sharing an "extreme, conservative/libertarian ideology." *Nothing For Free: How Judicial Seminars Are Undermining Environmental Protections and Breaking The Public's Trust* ("July 2000 Report" or "Report") at 2.

Supporters of the Kerry-Feingold bill have characterized privately-sponsored judicial education programs as "junkets" or "sophisticated bribes." But, in fact, such programs fulfill for judges much the same educational purposes as the fact finding missions that are often undertaken by members of Congress – and which are sometimes funded, at least in part, by corporate interests through foundations and institutes – to familiarize legislators with particular issues or problems, or regions of the world. The actions of Congress affect the lives of Americans, just like the decisions of judges. To ensure the integrity of government decisionmaking, all three branches of government have stringent ethics laws. And the ethics laws governing the Judiciary are already the most stringent of all.

For example, under the Ethics Reform Act of 1989, federal judges are permitted to attend non-government sponsored seminars, but may accept reimbursement only for their actual out-of-pocket expenses. In addition, judges must file annual financial disclosure reports, expressly listing such reimbursements from universities, bar associations, educational foundations, and any other non-governmental sources. Those reports are open to public scrutiny. Further, existing legal and ethical provisions already preclude judges from accepting anything of value from parties in litigation before them, and require a judge's recusal in any case where his or her impartiality might reasonably be questioned.

There can be no concern that privately funded seminars may serve as vehicles for *ex parte* communications between parties to litigation and the judges hearing their cases. Such a scenario would be plainly prohibited by existing law. Rather, the fundamental concern expressed in the July 2000 report is a more generalized one – that the existing privately-sponsored judicial seminars are "breeding a new conservative judicial activism." Report at 2. Thus, the report's real complaint is

about program *content*. Implicit in that concern is the fear that judges are not capable of detecting bias in arguments, and are not able to sift through differing opinions and reach their own independent conclusions. But that goes to the very heart of the judicial function. By selection, training, and experience, judges have great capacity to "filter" competing arguments and opinions and to determine what weight to accord them.[1] That is the very role that the Senate – and society itself – has entrusted to them, and that is the function that they perform every day.

Premising legislation on concerns about program content raises constitutional issues as well. Clearly, the First Amendment prohibits Congress from *directly* regulating or limiting the ideas and perspectives to which judges are exposed. Instead, the Kerry-Feingold bill would seek to accomplish that goal *indirectly* – by using the power of the purse strings. It is far from clear whether Congress can constitutionally accomplish by the back door what it cannot do through the front door.

Nor is the First Amendment the only provision of the Constitution implicated here. The Constitution provides for a Judiciary that is above politics, and independent of the control of both Congress and the Executive Branch. It would be wholly inappropriate for Congress to attempt to limit the topics and perspectives presented to the Judiciary – a co-equal branch of government. If Congress begins to dictate what judges can hear and from whom, the principles of separation of powers and judicial independence will be endangered.

Another misconception underpinning the July 2000 report is that the FJC is capable of meeting all the continuing legal education needs of the federal judiciary. Regrettably, that is not the case. The report concedes the importance of continuing education for judges:

> [J]udges must now routinely decide cases that turn on inordinately complicated scientific and technological questions. Keeping up with today's rapid pace of change is not easy for anyone, and for some judges the task is compounded by the fact that they have been out of school for many decades. Yet, to decide cases fairly, it is imperative for judges to keep current with legal, scientific and technological trends.

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[1] As Advisory Opinion No. 67, issued by the Judicial Conference's Committee on the Codes of Conduct, notes: "The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and trained to weigh them."

> What was good science or cutting edge technology only five years ago is often completely outdated today and occasionally considered wrong.

Report at 5. But, even as the cases before judges have become more and more complex (and thus the need for judicial education greater and greater), Congress has appropriated less and less money for the FJC.

The numbers speak for themselves. The FJC's appropriation for FY 1992 was $18,895,000 (in 1992 dollars); and its FY 2001 appropriation – nine years later – is actually *lower*: only $18,736,000 (in 2001 dollars). By any measure, Congress' funding for FJC programming has decreased. Over the years, Congress has been requiring the FJC to do more and more, with less and less. The FJC has struggled to stretch its scarce resources, by reducing the frequency of on-site workshops and seminars for judges, and experimenting with greater use of distance learning – particularly through the Federal Judicial Television Network ("FJTN"). But one judge sitting alone in a courthouse conference room viewing a lecture on closed-circuit TV is a poor substitute for the animated give-and-take exchanges among the faculty and groups of judges that typify the FJC's on-site workshops and seminars (as well as the judicial education programming offered by non-governmental organizations).

Moreover, the FJC is charged with continuing education and training for all personnel of the judicial branch – not just judges. While the July 2000 report emphasizes that the FJC sponsored 843 programs in 1998, it also concedes that a mere 69 of those were designed specifically for judges. Report at 6. The current issue of the "FJTN Bulletin" – which promotes the FJC programming for the months of February and March – drives home that point. (A copy is enclosed, for ease of reference.) The bulletin does feature several exciting new substantive programs targeting judges. But, as even a casual review of the bulletin illustrates, the great majority of the FJC programming addresses administrative issues and/or is designed for staff-level personnel. This is understandable. Particularly given its limited resources, it is simply cost-prohibitive for the FJC to even attempt to duplicate the variety and quality of the non-government sponsored training programs that judges today rely on to stay up-to-date on important developments in law, economics, science and technology.

Indeed, as introduced in the last Congress, the Kerry-Feingold bill would not only preclude judges from participating in programs funded by corporate entities or private foundations; it would also ban judges' attendance at educational programs sponsored by all other non-governmental organizations (such as, *e.g.*, universities, law schools, and bar associations, including the Federal Bar Association) – unless either the judges paid their own tuition and expenses, or the FJC specifically approved the program and paid the expenses from the limited funds that the bill would set aside for that purpose.[2]

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[2]The legislation would also jeopardize the FJC's ability to co-sponsor seminars with law schools and other organizations – something it has recently begun to do in an effort to make its dollars go further.

The bill thus would fundamentally alter the mission of the FJC, transforming it from a designer and presenter of judicial education programs, to an investigator and evaluator of outside education programs trying to determine whether those programs are "conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary." In essence, the bill would cast the FJC in the role of censor. As the Chief Justice put it, in his 2000 Year-End Report on the Federal Judiciary:

> The assignment to the FJC Board – or to any government board – of authority that is tantamount to deciding what seminars or educational meetings federal judges may attend – and to decide it under the extraordinarily vague standard [specified in the bill] . . . – has most of the elements commonly associated with government censorship.

The Chief Justice invoked Justice Holmes' famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), which captures the point in a nutshell: "[T]he ultimate good desired is better reached by free trade in ideas" than by censorship.

In short, while the goal of the Kerry-Feingold bill – ensuring the integrity of the judiciary -- is laudable and beyond dispute, the introduction of *any* legislation on the subject of continuing legal education for judges would be premature at this time. The more prudent course is to convene Congressional hearings on the broader topic, and to study and review any proposals advanced there.

Thank you for your consideration of the FBA's views on this matter. Please contact me at (202) 785-1614 if you have any questions, or if we may be of further assistance on this or any other issue of mutual concern.

Sincerely yours,

Robert A. McNew
President

Enclosure

cc (w/o Encl.): The Honorable William H. Rehnquist, Chair
Federal Judicial Conference

Leonidas Ralph Mecham, Director
Administrative Office of the U.S. Courts

The Honorable Fern M. Smith, Director
Federal Judicial Center

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 19, 2000
****

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Executive Committee

Agreed to communicate to Congress the following views on legislation to restrict judges' attendance at private educational seminars:

a. S. 2990 (106th Cong.) is overly broad; would have unintended consequences, such as prohibiting federal judges from reimbursed attendance at bar association meetings and law school seminars; raises potential constitutional issues, such as imposing an undue burden on speech; and would mandate an inappropriate censorship role for the Federal Judicial Center;

b. The proposed legislation raises a number of serious issues that deserve due consideration, including congressional hearings and an opportunity for the Judicial Conference to study and comment upon those issues and to take such action as is necessary and appropriate; and

c. In its present form, the Judicial Conference of the United States opposes S. 2990.

Agenda F-1 (Addendum)
Executive Committee
September 2000

ADDENDUM TO THE REPORT OF THE

EXECUTIVE COMMITTEE

TO THE CHIEF JUSTICE AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

JUDICIAL EDUCATION REFORM ACT

The Executive Committee requests that the Judicial Conference consider, as a matter of new business, the **Recommendation** set out below concerning the Judicial Education Reform Act of 2000, S. 2990 (106th Congress). A copy of the bill is attached as Appendix G.

The Judicial Education Reform Act of 2000 was introduced in the Senate on July 27, 2000, after a private organization issued a report critical of judges attending private educational seminars at the expense of the seminar sponsors. The bill would prohibit federal judges from accepting "anything of value in connection with a seminar." Instead, the Board of the Federal Judicial Center would have the power to authorize government funding for judges to attend only those "seminars that are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary." This determination would be based upon the consideration of extensive and intrusive information about the seminar content, its sponsors, presenters, and their employers.

At present, the FJC Board oversees programs of the Federal Judicial Center, which is charged by law with providing continuing education for judges and other court personnel. For

thirty-two years, the Center has ably performed this task. As described above, S. 2990 would drastically alter the role of the FJC Board. Even though the FJC had nothing to do with a seminar, its Board would be required to decide whether the seminar is "conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary." Neither the Center nor its Board has ever sought the expansive authority that would be conferred by S. 2990.

The Executive Committee recognizes recently expressed public concern raised by educational programs funded by private groups. Among the questions raised are issues of special influence or even the bending of judges to a private group's will. The Committee also recognizes that the judiciary always depends on the public's confidence in enforcing its mandates; the public's trust and confidence in the federal courts is the bedrock upon which our independent judiciary depends. But having these thoughts in mind, the proposals currently offered by a number of advocacy groups, and partially included in the proposed legislation, represent an inappropriate response to a highly complex question.

The First Amendment to the United States Constitution, itself, strongly counsels against undue and overly broad efforts to limit or restrict anyone's access to ideas.

Beyond this, the nation's most respected law schools have sponsored high-quality educational programs supported by private contributions from a number of funding sources, including private and public foundations, corporate entities, and law firms. All of these would be jeopardized or barred by the current proposals. Moreover, the Center itself has long co-sponsored programs and seminars with groups, organizations, or educational institutions, some of which receive the kinds of funds that are now being challenged.

It is no solution to suggest that the Federal Judicial Center can, or should, approve of training as a means of circumventing the possibility of having judges unduly swayed. The

Center's proper role does not include telling judges which kinds of speakers or presentations are "balanced." Indeed, the very concept of what is "balanced" is not at all clear. The pending proposals would force the Center into a new area of controversy, with no roadmap for assuring or approving content. And even if it were placed in that role, there are major conceptual problems with approving the quality or content of new and controversial ideas.

Although there are important distinctions between the judiciary and the other branches of government, it is instructive to note that the proposed restrictions in S. 2990 would appear to be the most restrictive imposed on government officials in any branch. Furthermore, existing legal and ethics provisions already restrict judges from accepting benefits from parties to litigation before them and provide for disqualification in any instance where a judge's impartiality might reasonably be questioned.

All of these thoughts suggest that a more prudent course for the courts, and those who are interested in judicial education, would be to have congressional hearings on this question, followed by study and review of those proposals that may come forward. This is not a time for hasty legislation that may well be more dangerous than the concerns it is designed to allay.

Recommendation: That the Judicial Conference communicate to Congress the following views on legislation to restrict judges' attendance at private educational seminars:

a. S. 2990 (106th Cong.) is overly broad; would have unintended consequences, such as prohibiting federal judges from reimbursed attendance at bar association meetings and law school seminars; raises potential constitutional issues, such as imposing an undue burden on speech; and would mandate an inappropriate censorship role for the Federal Judicial Center;

b. the proposed legislation raises a number of serious issues that deserve due consideration, including congressional hearings and an opportunity for the Judicial Conference to study and comment upon those issues and to take such action as is necessary and appropriate; and

c. in its present form, the Judicial Conference of the United States opposes S. 2990.

Ralph K. Winter

Committee: Edward R. Becker
Charles H. Haden II
Boyce F. Martin, Jr.
Leonidas Ralph Mecham
James M. Rosenbaum
Ralph G. Thompson
Juan R. Torruella

September 18, 2000

Appendix G: S. 2990 (106th Congress), the "Judicial Education Reform Act of 2000"

Statement Adopted by the Board of the Federal Judicial Center
October 24, 2000

S. 2990 (106th Cong., 2nd Session) would require the Judicial Conference to amend its regulations under the gift acceptance statute to prohibit federal judges from taking anything of value (including travel and lodging expenses) from any non-governmental source in connection with a "seminar," defined to include "panel discussions, conferences, colloquia, symposia, and other similar events." The bill would authorize for five years an annual $2,000,000 Judicial Education Fund. Money from the fund could be provided to private sponsors of judicial education seminar to pay judges' reasonable expenses in attending seminars approved by the Board of the Federal Judicial Center, which would be obliged to review information about seminar content and funding and litigation activities of sponsors and presenters. The Board would work under Judicial Conference guidelines "to ensure that the Board only approves seminars that are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary."

The Board has discussed and considered the potential consequences of S. 2990.

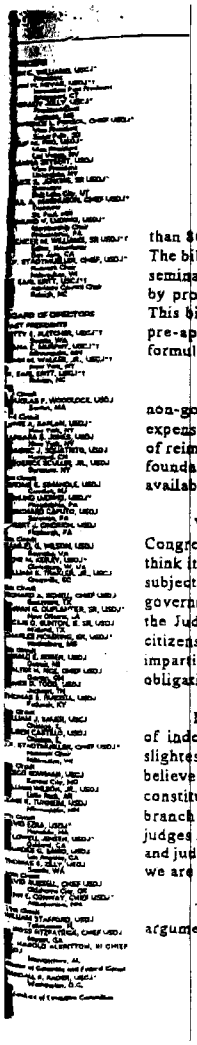
1. The Board opposes enactment of S. 2990 in its present form for the reasons stated by the Judicial Conference in its resolution approved September 18, 2000, and for additional reasons. As stated by the Conference, S. 2990 is overly broad; would have unintended consequences such as prohibiting federal judges from reimbursed attendance at bar association meetings and law school seminars; and raises potential constitutional issues, such as imposing an undue burden on speech.

2. The Board believes S. 2990 would transform the Center and its Board from designers and presenters of federal judicial education programs to investigators of judicial education programs of law schools, bar associations, and others. S. 2990 requires intrusive inquiries into attorney-client relationships and use of vague standards by which to judge others' programs.

3. The Board believes S. 2990 would jeopardize the Center's ability to co-sponsor the occasional education programs that it presents in cooperation with law schools and other organizations by requiring the Center to impose on its own co-sponsored programs a cumbersome review process and preventing law schools from making modest contributions-in-kind to these programs.

4. Advisory opinion 67 of the Codes of Conduct Committee properly recognizes that the "education of judges in various academic disciplines serves the public interest" and that judges may accept as gifts the expenses of their attendance at seminars organized by non-governmental entities, unless the organizers of the seminars are involved in federal litigation, the subjects of which may be raised at the seminar.

At the same time, the Board believes that federal judges should not have to rely solely on private organizations for their education. Some judges are opposed on principle to attending at least some private programs, and private programs do not offer the full range of orientation and continuing education that judges need. Adequate financial support for the Center is essential to ensure that it can provide judges a range of judicial education programs.



FEDERAL JUDGES ASSOCIATION
Office of the President
Hon. Ann Claire Williams
United States Court of Appeals
219 South Dearborn Street, #2612
Chicago, IL 60604

STATEMENT OF THE FEDERAL JUDGES ASSOCIATION
September 18, 2000

The Federal Judges Association, a private, voluntary association of more than 800 dues paying Article III judges, is strongly opposed to Senate Bill 2990. The bill attempts to ban federal judges' attendance at any and all non-government seminars, including universities, bar associations, and educational foundations, by prohibiting judges from accepting direct reimbursement of their expenses. This bill further requires all seminars attended by individual federal judges to be pre-approved and funded by the Federal Judicial Center under a congressional formula.

Under the Ethics Reform Act of 1989, federal judges are allowed to attend non-government sponsored seminars and to only be reimbursed for their actual expenses. Currently, federal judges must file annual financial disclosure reports of reimbursements for expenses from universities, bar associations, educational foundations, and any other non-governmental seminars. These reports are available for public scrutiny.

We are opposed to Senate Bill 2990 because, while we appreciate Congress's concern to assure ethical behavior of all public servants, we do not think it is appropriate for Congress to attempt to limit, or otherwise control, the subject matter and view points presented to the judiciary, a co-equal branch of government. The Federal Judges Association is keenly sensitive to the fact that the Judiciary and each individual judge, bears an obligation to convey to the citizens of this nation – and even to the world – an unsullied image of integrity, impartiality, incorruptibility and independence. Our canons of ethics reflect this obligation.

It is critical for the Judiciary to convey the impression -- and the fact -- of independence from politics, and independence from control, even in the slightest degree, by the legislative and executive branches of government. We believe that Senate Bill 2990 would have the effect of infringing upon this constitutional and historical principle of judicial independence. If the legislative branch can interfere with what judges hear, from whom judges hear it, where judges hear it, and how judges hear it, then the principles of separation of powers and judicial independence have been seriously eroded. The public perception that we are truly independent will surely have been blurred.

The Federal Judges Association believes it obvious that hearing informed arguments and opinions from all points of view is at the heart of the work we do.

We seek that information in the court room, and often find it there. In this fast moving world, however, there is a wealth of information on the cusp of science, economics, law, and myriad other subjects, that is not presented in day to day litigation. Yet such frontiers of learning can be of vital importance to the judiciary. Such information is available from many sources, including universities, government sponsored seminars, and private educational foundation seminars.

The Federal Judges Association believes that it would be unwise for the legislative branch to attempt to impose legislative restrictions on judicial education. With great respect for the genuine concerns that Congress may have that all public servants avoid even the appearance of conflicts of interests, we do not think Congress should attempt to control, directly or indirectly, what material judges read, what lectures judges hear, or what programs they attend. It would seem that judges must be entitled to practice their legitimate rights under the First Amendment to no lesser extent than the citizenry generally. We believe that experienced, perceptive, and sensitive federal judges, guided by the judicial canons of ethics, are qualified, trustworthy, and are vested with the authority to make the proper choices.

For these reasons, the Federal Judges Association opposes Senate Bill 2990.

UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10278-0001

CHAMBERS OF
JUDITH M. BARZILAY
JUDGE

November 16, 2001

Chairman, House Committee on the Judicary
2138 Rayburn House Office Building
Washington, D.C. 20515-4909

Congressman Howard Coble
House Committee on the Judicary
2138 Rayburn House Office Building
Washington, D.C. 20515-4909

Dear Congressmen:

I am writing you at the suggestion of Melissa McDonald regarding a hearing to be held November 29th by your committee which will discuss, among other topics, privately funded educational programs for Federal judges. Melissa suggested that I submit the attached letter to be part of the record of the hearing.

In it I support the opportunity these programs provide for my fellow judges.

Thank you for your consideration. Should you have questions, I can be reached at 212-264-5420.

Very truly yours,

Judith M. Barzilay

JMB/mri
cc: Ms. Melissa McDonald

[dictated; not read]

UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10278-0001

CHAMBERS OF
JUDITH M. BARZILAY
JUDGE

November 15, 2001

Via Facsimile: 202-225-5851

Hon. Steven Rothman
U.S. House of Representatives
1607 Longworth House Office Building
Washington, D.C. 20515

Re: Hearing on Educational Programs for Federal Judges

Dear Congressman Rothman:

Your staffer, Arlene Miller, suggested I fax this letter to you. It is my understanding that your House Subcommittee on the courts will hold a hearing on November 29, 2001 to discuss private educational programs for federal judges including those sponsored by the George Mason Law and Economics Center. As one of your constituents and a participant in several of George Mason's programs, I write in support of those programs.

First, a few words to establish my bonafides. I am a 1998 Clinton appointee to the U.S. Court of International Trade, a federal court of limited jurisdiction confined to adjudicating cases brought under the import and export statutes of the United States. I am a registered Independent, but would described myself as a fairly unreconstructed 60's liberal. (That last statement has probably ruined whatever chances I might have had for appointment to the appellate bench).

The George Mason programs are the only private educational programs for judges that I have attended. They are academic in nature, do not espouse any particular point of view, and attract only the best professors. For instance, in one program I attended, *Economic Implications of Public Law*, we were privileged to hear from Dr. James M. Buchanan, who is a Noble Laureate in economic science. Last summer I attended a program on the *Evolution of Norms*, where our instructors included Professor Lionel Tiger of Rutgers (another New Jersey alum) and other professors from Berkeley and Yale.

My friends at George Mason tell me that corporate funding accounts for only 13% of their budget and they do not disclose their donors. Therefore, there is no opportunity for judges to be influenced to benefit one of their donors since we have no idea who they are. In addition, these programs are held off-site as George Mason does not have retreat facilities such as the ones at

Princeton, New York University, Yale and The University of Virginia. These programs are scheduled off-season so that George Mason can get reasonable rates from the hotels involved.

Congressman Rothman, I have found the two programs that I attended to be of enormous value as they gave me an opportunity to study with the most knowledgeable professors along with other federal judges, eager to be there and to question all the assumptions proposed. It was truly an intellectual feast. We federal judges are called upon to handle more and more cases, sometimes in a highly accelerated atmosphere. It is my opinion that these programs allow us to charge our batteries so that we can return to our jobs to be even more effective public servants. They are important and the Congress should not act to curtail them. I encourage you to join me at one of the programs in the future, if you can. You would be most welcome. Should you have any questions, I would be pleased to speak with you. Call me anytime in my chambers at 212-264-5420.

Very truly yours,

Judith M. Barzilay

JMB/mrt
bcc: Prof. F.H. Buckley

DAVID LOUIS WHITEHEAD

TESTIMONY/STATEMENT

TO THE UNITED STATES HOUSE JUDICIARY COMMITTEE & SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY

WASHINGTON, D.C. Zip Code 20001

OCTOBER 25, 2001

October 25, 2001

STATEMENT OF DAVID LOUIS WHITEHEAD

Congressional Hearing on Judicial Reform on statutes 28 U.S.C. 455, 144 & 372

I David Louis Whitehead am writing the Judiciary Committees to express my views for radical Congressional judicial reform pertaining to the statutes 28 U.S.C. 455, 144, & 372.

I am a native-born citizen of the United States of America.

I am a former employee of the United States Central Intelligence Agency from 1983 to 1990.

On February 13, 1990, I received the CIA's Exceptional Performance Award for Superior Accomplishment.

On March 1, 1990, I was involuntarily discharged from Central Intelligence.

I am currently an adjunct professor at Strayer University. I teach a course entitled "Introduction to Comparative Politics."

I am an author of several books, including Brains, Sex, & Racism In The CIA And The Escape and Quotes On The Assassination of President John F. Kennedy.

My presentation to the United States Congress makes the point I am a victim of the misuse of the current judicial statutes and laws relating to rule 28 U.S.C. Sections 455, 144, and 372.

- In 1994, Judge Paul L. Friedman testified to the United States Senate Judiciary Committee for confirmation to become a federal judge. At that time, he stated:

"I will not participate in any cases where a party is represented by White and Case. I will recuse myself from any and all cases where I have a potential personal or pecuniary conflict of interest, or where there is an appearance of one, including cases involving clients I have represented on a regular basis, companies in which I am aware my wife or I have substantial stock holdings, partnerships in which we have a financial or personal interest, or companies that invest or manage our personal funds..."

Judge Friedman was a former employee and Executive Partner of the law firm White & Case from 1976 – 1994.

- In the early 1990s, a partner in White and Case became interim President of the MGM film studio. Judge Friedman had knowledge of his partner's position at MGM.

On June 14, 2000, Judge Friedman dismissed my case against MGM. The case David L. Whitehead v. MGM Inc., et al., 96cv256 had merit. However, Judge Friedman protected his interest in White and Case by dismissing the case without so much as a hearing.

- On his financial disclosure report filed with his Senate Confirmation testimony, Judge Friedman stated the following:

"Upon my appointment to the United States District Court for the District of Columbia, I will withdraw from my partnership in the law firm of White and Case...

With respect to continuation of payments by White and Case and continuing participation in employee welfare or benefit plans, I report the following:

1. Under the White & Case partnership agreement to which I became a party on October 1, 1979, I am entitled to be paid in equal installments on a monthly basis over six years what is due me from my capital contribution account, based on contributions I have already made.
2. Under the White & Case Retirement Income Pension Plan for Eligible Partners, a qualified defined benefit plan, effective January 1, 1989, I will be entitled to be paid a fixed sum annually upon reaching the age of 65.
3. Under the White & Case Savings & Investment Plan, a profit-sharing plan with a section 401 (K) component, which became effective on January 1, 1983, I will be entitled to receive my account balance upon reaching age 59 1/2 .
4. I also am, and will continue to be a general partner with White & Case partners and former partners (and, in some cases, their spouses) in Wallpark Investors, an investment general partnership which in turn is a limited partner in three separate limited investment partnerships in which I have invested through Wallpark: Advent V, Advent VI and Media Communications II.

Each is invested in a portfolio of venture capital companies and is managed by an outside investment adviser which is the general partner of each."

- At his Senate Confirmation hearing, Judge Friedman also lists his investments in the Walt Disney Company & Paramount Communications Company, which includes Simon & Schuster Inc. Judge Friedman has past relations with the Hollywood studios and ASCAP.

During the hearing, Judge Friedman was asked: "Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities." He responded to the Senate Judiciary questionnaire:

"In 1990 and again in 1992, I was involved in Eleanor Holmes Norton's campaign to become the District of Columbia's Delegate to Congress. In 1990, I was listed as one of the co-chairs of her campaign, and in 1992, I was one of the sponsors of a fundraiser for her among lawyers..."

- In 1996, Judge Friedman improperly presided over the case **David Whitehead v. John Deutch,** 96cv420, which involved Delegate Eleanor Holmes Norton as a material witness. Delegate Norton had been a defendant in related matters. For instance, Delegate Norton was named in the case, **Whitehead v. Robert M. Gates, & Eleanor Holmes Norton**, et al., 92cv917; and later named in the case **Whitehead v. Woolsey, Norton,** et al., 93cv1363-a. This occurred in the Eastern District of Virginia.

In 1996, I met with President William Jefferson Clinton's personal attorney Robert S. Bennett for legal representation in the cases David Whitehead v. Paramount Pictures Corporation, Inc., et al. 96ca7386, in the Superior Court for the District of Columbia; and Whitehead v. Paramount Pictures Inc., et al., 96-7212 in the United States Court of Appeals for the District of Columbia Circuit.

President Clinton's legal representatives, Williams and Connolly, entered their appearance with O'Melveny & Myers law firm and removed the case Whitehead v. Paramount Pictures Corporation, Simon and Schuster, Time Warner, Warner Bros, Walt

Disney, et al., no. 96ca7386 to the federal court. Noting that President Clinton gave a Presidential appointment to a Partner of the law firm O'Melveny & Myers.

On October 17, 1996, attorney Robert S. Bennett sent me a letter declining to represent my interest in the cases pending in Whitehead v. Paramount Pictures Corp., et al., no. 96cv2436 and in **Whitehead v. Paramount Pictures Corp.,** et al., no. 96-7212 before the Court of Appeals. Noting that Circuit Judge David Sentelle ruled on the matter when he was president of a legal foundation named after Edward Bennett Williams of Williams and Connolly. Further, in the late 1980s, attorney Bennett and Judge Friedman co-edited a paper for the American Bar Association.

Judge Sentelle was on the panel in Whitehead v. Paramount Pictures Corporation Inc., 96-7212, affirming the rulings of Judge Aubrey Robinson in Whitehead v. Paramount Pictures Corporation Inc., et al., 96cv1616.

On November 6, 1996, the Calendar Committee chaired by Judge Royce Lamberth assigned the second related case **Whitehead v. Paramount Pictures Corporation, Inc. Simon & Schuster Inc., Time Warner, Walt Disney, Warner Bros.,** et al., no. 96cv2436, to Judge Paul L. Friedman.

In 1992, Judge Lamberth had previously barred me from his courtroom in criminal case United States v. Clair E. George. The public trial was on Iran/Contra. Judge Friedman was a Government investigator on Iran/Contra.

Judge Lamberth should have recused himself from the Calendar Committee's assignment of my cases to Judge Friedman (96cv420 Whitehead v. Deutch and 96cv2436 Whitehead v. Paramount Pictures Corp. Inc.).

Judge Lamberth did recuse himself from the case Whitehead v. Robert Gates & Eleanor Holmes Norton, 92cv917, which involved my intellectual property. My CIA book, entitled "Brains, Sex, & Racism In the CIA and the Escape" discussed the 1990 political campaign of Delegate Norton, which involved Judge Friedman as co-chair of her campaign. Therefore, Judge Friedman should have recused himself from the case Whitehead v. Deutch, 96cv420, which involved Delegate Norton as a material witness.

- In 1996, the Calendar Committee chaired by Judge Lamberth assigned Judge Friedman the case Whitehead v. Deutch, 96cv420, involving Delegate Norton.

Noting that Judge Lamberth recused himself from the related case Whitehead v. Gates, & Eleanor Norton 92cv917, naming Delegate Norton as a defendant.

The case, Whitehead v. Gates & Eleanor Norton, 92cv917, was assigned to Judge Norma Holloway Johnson.

In 1993, Judge Johnson dismissed the case, Whitehead v. Gates, & Eleanor Norton, 92cv917, granting summary judgment on a false CIA affidavit. Judge Johnson denied discovery. The Government did not answer the complaint filed in the case, pursuant to rule 7. The matter concerning the CIA's false affidavit filed in the case, Whitehead v. Robert Gates, & Eleanor Holmes Norton, no. 92cv917, is currently pending before the court. Noting that Congressional Howard Coble cited Judge Johnson for allegedly violating the district court's random computer case selection process, which led to the district court changing its policy.

- In March 1997 and June 1997, Judge Friedman issued dismissal rulings in the related case Whitehead v. Deutch, 96cv420, which involved Delegate Norton as a material witness. Noting that in February 1997, Judge Friedman obtained

my CIA book, which discussed the 1990 campaign of Delegate Norton, from Williams and Connolly and other defendants in related case Whitehead v. Paramount Pictures Corporation, et al, 96cv2436.

On November 22, 1996, Judge Friedman issued a memorandum order denying the defendants motion to dismiss, but gave Williams and Connolly and other defendants legal advice to move for summary judgment. Judge Friedman, as Judge Johnson in related case Whitehead v. Robert Gates, & Eleanor Holmes Norton, 92cv917, denied discovery. Judge Friedman did not order defendants to file answers to my complaint, pursuant to rule 7.

In addition, Judge Friedman barred me from filing papers in the case Whitehead v. Paramount Pictures Corp. Inc., 96cv2436, and in related case, Whitehead v. Deutch, 96cv420.

Williams and Connolly filed Paramount Pictures motion for summary judgment in February 1997, attachment of my CIA book. Therefore, Judge Friedman had possession of my CIA book. Judge Friedman learned about my political views of Delegate Norton's 1990 campaign, which he co-chaired. Judge Friedman read my book according to his June 30, 1999 dismissal order in Whitehead v. Paramount Pictures Corporation Inc., et al., 96cv2436.

- Judge Friedman failed to disclose his past relationship with his employer Eleanor Holmes Norton, and his financial and legal relationship with White and Case and others, pursuant to Canon 3E CMT (1990) "Disclosure is necessary prerequisite to a waiver of disqualification."

Further, Judge Friedman failed to recuse himself from the case 96cv420 Whitehead v. Deutch, which involved Delegate Norton as a material witness. Judge Friedman's participation on the case, 96cv420 Whitehead v. Deutch, gave an appearance of partiality and bias, if not actual bias. Delegate Norton supported his judgeship. Therefore, recusal was necessary and should have been required of the court.

In related cases which included the matter of **Whitehead v. Paramount Pictures Corporation, Simon & Schuster, Time Warner, Warner Bros., and Walt Disney**, et al., no. 96cv2436, Judge Friedman had a direct conflict of interest involving his financial arrangements with the law firm White and Case and Wallpark investors of White and Case and their spouses.

For instance, in 1998 & 1999, White and Case was involved in a Department of Justice deal with Simon and Schuster and publishers Houghton Mifflin, during the time when Judge Friedman presided over my claims against Simon and Schuster.

As stated, White and Case also represents MGM film Studio. Judge Friedman improperly dismissed the case Whitehead v. MGM Inc., et al., no. 98cv256.

- White and Case represents Time Warner and Home Box Office. Judge Friedman improperly dismissed the case Whitehead v. Time Warner Inc., et al 98cv257; and Whitehead v. Dreamwork Pictures and Home Box Office, et al., 98cv1917. Noting that Dreamwork Pictures received a billion dollar loan from Chemical Bank. White and Case represents Chemical Bank. As stated Judge Friedman receives a pension and other financial arrangements from White and Case.

- Judge Friedman is a personal friend of Carol Lamm of White and Case, who received a Presidential appointment from President Clinton. Attorney Lamm represents the country of Indonesia, which involves the LIPPO affair and James Riady. Most recently, Indonesia had internal riots concerning the US military action in Afghanistan – relating to the September 11, 2001 attack on America. (See attachments on Riady).
- On November 8, 1999, Judge Friedman dismissed the case Whitehead v. William Jefferson Clinton, Unnamed Georgetown University, et al. no. 99cv2891. Noting that Judge Friedman taught at Georgetown University.
- Judge Friedman dismissed the case Whitehead v. Carroll & Graf Publishers Inc., et al., 98cv202, which involved the assassination of President Kennedy. President Clinton's personal attorney Robert S. Bennett represents the Abraham Zapruder family on the famous Kennedy assassination tape. Noting that Judge Friedman and attorney Bennett co-edit an ABA paper in the late 1980s.
    - Judge Friedman dismissed the case Whitehead v. New Line Cinema Inc., Time Warner, et al. no. 98cv1231, which involves my graduate college paper at Howard University. My college paper, entitled "International Law Regarding the Use of Force and Collective Security A Comparative Analysis of the Korean and Persian Gulf Wars" suggests that former President George H.W. Bush created the Gulf War to divert attention from the Savings and Loan scandal, which involved his son Neil Bush. (See attached letter to Benjamin Zinkin of New Line Cinema dated March 10,

1998.) Noting that White and Case represented President George W. Bush in the Florida presidential election 2000 controversy. Also see Presidential candidate Ross Perot's third debate remarks on US Ambassador April Glaspie to Iraq before Saddam invaded Kuwait. (Also see attachment of attorney Beth Walker's supplemental brief in Whitehead v. H. Patrick Swygert & Howard University, nos. 99cv1345 & 99-cv1725 in District of Columbia Court of Appeals.).

- Judge Friedman dismissed the case, Whitehead v. Columbia Pictures Inc., 98cv1882; and Whitehead v. Columbia Pictures Industries Inc, Time Warner, Dreamwork Pictures, Walt Disney, Warner Bros, Paramount Pictures, et al., no. 98cv2938. Noting that White and Case represents Columbia Pictures & Sony, Time Warner, Warner Bros, HBO, and ASCAP. (**Also see Chemical Bank 1 Billion dollar loan to Dreamwork Pictures. White and Case represents Chemical Bank.).**
- Judge Friedman dismissed the case Whitehead v. Warner Bros, Time Warner, et al., 97cv752. White and Case represents Time Warner Inc. and Home Box Office of Warner Bros.
- In 1999, during the pendency of my appeals, Circuit Judge Judith Rogers gave a $250.00 gift to Judge Friedman. Judge Rogers, a Clinton appointee presided over panels of my appeals involving Judge Friedman.

As a lawyer, Judge Rogers represented a client named Steve A. Friedman. It's unclear at this time whether attorney Steve A. Friedman is related with Judge Friedman.

- Both Judges Rogers and Friedman clerked for Judge Aubrey Robinson. Judge Robinson, as stated earlier, dismissed the case, Whitehead v. Paramount Pictures Corporation, Inc, no. 96cv1616. Moreover, Judge Robinson dismissed my aunt's case Linda J. Smith in the matter of Smith v. Barry, 96cv1006. Noting that CIA records alleged that Ms. Smith threatened the CIA due to racial harassment of me, her nephew. Judges Robinson, Lamberth and Friedman were involved with Iran/Contra.

In short, Judge Friedman dismissed my 11 civil lawsuits without answers to the complaints, in violation of Rule 7, and without discovery.

- Judge Friedman received all of my 11 civil lawsuits without the random computer selection of case process, which relates to Congressman Coble's inquiry of the Chief Judge Norma Holloway Johnson's alleged violations, improperly channeling cases to Clinton appointees.
- On February 7, 2001, Judge Friedman filed a statement in case **Whitehead v. Columbia Pictures Industries Inc.,** et al., no. 98cv2938, which stated the following:

"... The undersigned has reviewed all of his financial disclosure forms since 1994 when he was appointed to the Court. A review of those filings reflects that the stock he previously owned in Paramount Communications was sold in 1993, before the undersigned was nominated to be a judge of this Court. The stock he owned in the Walt Disney Company was sold on August 30, 1994 and on January 10, 1995. The proceeds from these sales were invested in mutual funds. To his knowledge, the undersigned has never owned stock in Columbia Pictures Industries or any related entity. He has invested

in the Columbia Futures Fund which, to the knowledge of the undersigned, has nothing whatsoever to do with Columbia Pictures..."

- To the contrary, Judge Friedman lists his Paramount Communication stock to the Congress in 1994; however, his statement filed with the court states that he sold his Paramount Pictures stock in 1993. See attached Statement of Judge Friedman dated Feb. 7, 2001.
- Further, Judge Friedman failed to mention that White and Case represent Columbia Pictures and Sony. Judge Friedman receives money from White and Case and Wallpark Investors, which represents Sony.

Attorney Beth A. Walker and I filed misconduct complaints against several judges, which included Judges Lamberth, Friedman and Johnson.

Judge Colleen Kollar-Kotelly improperly participated on the Judicial Council, when her husband John Kotelly, a General Partner in the law firm Dickstein Shapiro Morin and Oshinsky, which is counsel of record in the case, Whitehead v. CBS/Viacom Inc., et al., 01cv1192.

Attorney Paul Taskier of Dickstein Shapiro Morin and Oshinsky is opposing counsel in the case Whitehead v. CBS/ Viacom Inc., 01cv1192.

Judge Kotelly should not have presided over the judicial misconduct matter due to the fact that both Dickstein Shapiro Morin and Oshinsky and White and Case represent Viacom Inc., and her husband John Kotelly work for Dickstein Shapiro Morin Oshinsky.

Circuit Judge Judith Rogers should not have presided on the Judicial Council involving misconduct complaint filed against Judge Friedman due to the fact she gave him a $250.00 gift during the pendency of my appeals. Judge Rogers also participated on panels involving my appeals of the rulings of Judge Friedman.

Attorney Walker's misconduct complaint to the Judicial Council stated: "...Such prejudicial conduct includes the use of the trial judge's office to obtain special treatment for his friends and former partners. The trial judge should never had considered hearing the case of David Whitehead when a material witness to the dissemination of his book on the CIA included Del. Holmes Norton. The trial judge managed her campaign. The trial judge's actions in the Criminal cases of LIPPO employees and the David Whitehead cases brings his judicial office into disrepute. See Hasting v. Judicial Conf. Of the U.S., 829 F. 2d 91, 106 (D.C. Cir. 1987). The trial judge's conduct falls directly inside the misconduct targeted by rule 4 c (1) D.C. Cir. Jud. Misconduct."

Attorney Walker's misconduct complaint concluded: "The trial judge lied to Congress when he stated to during confirmation hearings that he would not hear cases involving clients of his law firm [White and Case].... "His financial statements reveal financial conflicts and should be scrutinized to ensure they are in accord with 28 U.S.C 455 and of Advisory Opinion No. 57. The Council should investigate if in fact the trial judge was engaged in the practice of law from the bench, which amounts to high crime and misdemeanor, and any other areas of criminal stature violations. This review of the judge's actions will help promote public confidence in our judicial system of government..."

In sum, based on the above statement, I believe that the statutes 28 U.S.C 455, 144 and 372 should be changed. There were massive Canon violations involved in my civil cases in the district court and court of appeals. Further, it is my opinion that Judge Friedman and other judges of the court rulings in my cases were false. See attached letters from Dr. Barry Casey, and Samuel Yette.

I have filed a federal election complaint stating that Judge Friedman and other judges' rulings involved in this matter were political and economic contributions to the Democratic National Committee, Clinton/Gore, White and Case, Judge Friedman and others. (See attached letter from Federal Election Commission dated October 16, 2001). (Also see Chart of Attorney Beth Walker, which states that the President Clinton used the Central Intelligence Agency for DNC 1996 campaign finance fundraising operations).

I believe that the Congress of the United States should investigate this matter, or in the alternative order a judicial review of the misconduct complaints filed by Ms. Walker and me. Clearly, the Judicial Council was contaminated. Judge Friedman and his colleagues are not above American laws, which were created by the Congress.

Respectfully,

David L. Whitehead

Subscribed and sworn to before me this
23 day of October 20 01
Notary Public
My Commission Expires September 14, 2005

Cc FEC

Cc Beth Walker, Esq.

Notary

FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 16, 2001

David Louis Whitehead
1101 Westfield Drive
Oxon Hill, MD 20745

RE: MUR 5237

Dear Mr. Whitehead :

This letter acknowledges receipt of your complaint on October 9, 2001, alleging possible violations of the Federal Election Campaign Act of 1971, as amended. The respondent(s) will be notified of this complaint within five business days.

You will be notified as soon as the Federal Election Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be notarized and sworn to in the same manner as the original complaint. We have numbered this matter MUR 5237. Please refer to this number in all future communications. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

Jeff S. Jordan
Supervisory Attorney
Central Enforcement Docket

Enclosure
Procedures

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 99 CV-1345 and 99 CV 1725

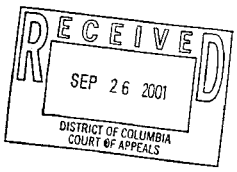
DAVID WHITEHEAD,

Appellant,

V,

H. Patrick Swygert, ET AL.,

Appellees.



SUPPLEMENTAL BRIEF

ANALYSIS:

Plaintiff Claims that Defendants, Howard University breached its contract with Plaintiff by deciding not to allow him to enter their PHD program and imposing on him a higher standard than they imposed on other applicants that year, and imposing a biased review panel on him. Mr. Whitehead claimed in the past that the University was negligent in failing to award him his well-earned Master's Degree from the same institution. The prior lawsuit regarding the failure of Howard to grant his Master's Degree in the same department, political science, was settled while the case was on appeal. Plaintiff asserts that he did in fact comply with all of the University's procedures. Plaintiff has alleged causes of action for tort, discrimination, and contract claims.

Secondly, Plaintiff has adduced facts to show that Defendant breached a legally imposed duty to him.

THE CONTRACTUAL RELATIONSHIP BETWEEN DEFENDANT AND PLAINTIFF WAS BINDING

The relationship between an educational institution and its students are contractual in nature as stated in *Baach v. George Washington University, 370 A.2d 1364, 1366 (D.C. 1977).* Baach holds that the elements of a contract are offer, acceptance and consideration. Plaintiff's enrollment in Howard University is an act of acceptance of the Defendant's offer and his subsequent tuition is the consideration, therefore, all of the elements of a binding contract are present.

DEFENDANT'S DECISION NOT TO ADMIT PLAINTIFF INTO THEIR PHD PROGRAM:

Ms. Whitehead contends that the University breached its contract with him by failing to follow the procedures in the Rules and Regulations and the Bulletin. Plaintiff contends that he has met the requirements of the admission process and was unfairly denied admission because of his earlier suit against the school, and a bias against him as a former CIA employee who had brought one of the first discrimination cases ever against that intelligence agency. The Defendants admitted during the discovery process that they do indeed have contracts with the CIA and that there were students admitted to the program with lower qualifications that the Plaintiff. Howard University, the defendant had the burden of proving that there were no genuine issues of material fact in dispute. Mr. Whitehead's claims that he was unfairly denied admission to the program based on extra-academic issues is supported by factual and legal support.

During this time period Mr. Whitehead was properly enrolled at Howard, thus there was a contractual relationship between Howard and Plaintiff. The University owed Plaintiff a

duty to assist him in his academic pursuits during this period. Howard had an obligation to assist the Plaintiff in an unbiased manner before the PHD selection panel.

The unrebutted record in the instant case supports a finding that the Defendant did not adhere to University policies set forth in the Rules and Regulations and Bulletin, which form the basis of the Defendant's contractual relationship with Plaintiff. Furthermore, although Courts are reluctant to engage in judicial review of an educational institution's academic decisions as stated in Univ. of *Mich. V. Ewing, 474 U.S. 214, 225 (1985)*. Courts will and should overturn academic decision when it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

THE LAW OF THE CASE DOCTRINE

The term "law of the case" designates the principle that the legal questions thus determined by the Court will not be differently determined on a subsequent review of the same case issue. It is also sometimes used more broadly to indicate the principal that a decision of the Court, unless properly set aside, is controlling at all subsequent stages of the litigation. The doctrine applies in criminal as well as civil cases and comprehends things decided by necessary implication as well as those decided explicitly. *Paul v. U.S. 734 F 2d 1064 (1984 CA5 Tex)*.

The law of the case is a discretionary doctrine which does not constitute a limitation of the court's power but merely expresses the general practice of refusing to reopen which as been decided. Judges of coordinate jurisdiction are not bound by each other's rulings, but are free to disregard them if they choose. The only limitation placed upon a trial judge's decision to disregard a previous ruling by a judge of coordinate jurisdiction is that prejudice not ensure to the party seeking the benefit of the doctrine. United States v. Birney 686 F 2d 102 (CA2 NY, 1982).

The law of the case doctrine holds that when a court decides upon a rule of law, that decision should generally control the same issues throughout the subsequent stages in the same case. Arizona v. California 460 U.S. 615, 103 S. Ct. 1382 (1983). It is based on the sound salutary policy of judicial finality that all litigation should come to an end. This is a prudential doctrine, it guides and influences the Court's exercise of discretion, but it does not limit the court's jurisdiction or power.

In the Whitehead matter before the Court, the Plaintiff was severely prejudiced when the trial judge failed to honor the law of the case as spelled out in her order dated May 25, 1999 which clearly indicated a balance between what the Plaintiff and Defendant at the pre-trial stage would be able to file with the consent of the court. Plaintiff would be able to file his Amended Complaint and the defendant would be able to file a Motion for Summary Judgment, on or before June 30,1999 which I may add was not even filed in a timely manner. It is questionable if Plaintiff was indeed entitled to his default judgment after their previously late filed responsive pleading. It is doubtful that the Office of Court Clerk wrongfully returned defendant's responsive pleading.

SUMMARY JUDGEMENT – ABUSE OF DISCRETION

In *Alden v. Georgetown University, 734 A 2d 1103, 1109 (D.C. 1999)* the Court held that in cases involving academic dismissal, educational institutions are entitled to summary Judgment unless the Plaintiff can provide some evidence from which a fact finder "could reasonably conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance. Plaintiff has presented to the Court evidence that the decision by the Defendant to deny him admission to its PHD program was motivated by bad faith and ill will unrelated to academic performance. It was retaliatory for his prior suit at the Master's level and tied to his earlier discrimination suit against the CIA which the University admitted to have signed contracts. Moreover, the nature of the Plaintiff's writing were critical of past actions of

the CIA. His Master's thesis alone was explosive and fraught with dangerous political overtones for the Administration in office at the time. Example: His non-these option paper was entitled: " International Law Regarding the Use of Force and Collective Security, a Comparative Analysis of the Korean and Persian Gulf Wars". Basically a "wag the dog" premise, before the movie came out.

In Summary Judgment Cases, the Appeals Court must conduct an independent review of the record limited to consideration of whether the trial court conducted an adequate review of the record. The Court will review sua sponte a trial court's failure to raise an actual issue only when the Court finds that the trial court should have reasonably recognized that the non-moving party in some way disputed the pertinent issue. Williams *v. Gerstenfeld, 514 A.2d 1174 (D.C. 1986)*. Generally, matter not properly preserved to a trial court will not be resolved on appeal. The standard of review on appeal is the same as the trial court's standard. In the instant case, the Plaintiff gave the Court adequate grounds and pertinent issues that should reasonable have been preserved for a jury.

To the contrary the record reflects that Howard University has not refuted the Plaintiff's claims of bias, bad faith and ill will unrelated to academic performance. The party moving for summary judgment in the instant case did not meet their burden of establishing that there was no genuine issue of material fact. Mr. Whitehead, the non-movant presented concrete evidence that genuine issues of material fact existed for resolution of the trier of fact. *Bias v. Advantage Intern, Inc. 905 F 2d 1558 (D.C. Cir. 1990); United Mine Workers of American 1974 Pension v. Pittston Co., 984 F 2d 469 (D.C. Cir. 1993)*. Plaintiff has met his burden of demonstrating that there are many disputed genuine issues of material fact that undermine Defendant's entitlement to judgement as a matter of law. Accordingly, Defendant's late motion for summary judgement, which was granted by the trial court, should be overturned on appeal.

Summary judgment is an extreme remedy which is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law. Willis v. Cheek, 387 A2d 716 App. D.C. (1978). Moreover, summary

judgment may be granted in an action if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law. Nader v. de Toledano. 408 A 2d 31 (D.C. App. 1979). Summary judgment should be granted sparingly in cases involving motive or intent; therefore, when the Motion for Summary Judgment is based solely on the testimony of an interested party and knowledge of the basis for that testimony is largely in the hands of the witness, summary judgment ordinarily should not be granted. Richardson v. District of Columbia 522 A2d 1295 (D.C. App. 1987). In the instant case before the Court, the basis of the ruling in favor of Summary Judgment for the Defendant was based upon the affidavit of an interested party, the University President; therefore, summary judgment should not have been granted.

PRO SE LITIGANT

The district Court has an obligation to insure that a pro se litigant is given fair and meaningful consideration of all claims presented. In re Schultz Mfg. And Fabricating Co., Inc. 110 B.R. 384 (N.D. Ind. 1990) . Rigor in examination of such claims and Motions is inappropriate. Pro se Litigants must be held to less stringent standards than pleadings drafted by lawyers. Federal National Mortgage Assoc v. Cobb 738 F. Supp.1220 (N.D. 1990) Generally, whether complaints have been filed by attorneys or lawyers, courts should give reasonably tolerant reading to complaints. Where complaint is almost barren of facts but liberal reading of complaint indicates that it contains claims of general category, claimant is entitled to at least try and prove his claim.

NEGLIGENCE – TORT CLAIM

The Plaintiff in his tort action alleging negligence by the Defendant bore the burden of proof on three issues.

(1) The applicable standard of care

(2) The deviation by the defendant from that standard of care and

(3) A causal relationship between that deviation and the plaintiff's injury.

By failing to provide him with a proper selection panel the University breached its duty. Plaintiff has identified a legal duty owed to him by the University. Mr. Whitehead demonstrated an independent legal duty of defendant, which emanated from his separate breach of contract claim. Plaintiff asserts that defendants tortuously interfered with his contract. Assuming defendants "interfered with Mr. Whitehead's contract with the University, they acted as agents of the University. In *Van Allen v. Bell Atlantic, 921 F. Supp. 830 (D.C. 1996),* the court affirmed that a tortuous interference claim must involve intentional procurement of the breach. In *Raskauskas v Temple Realty Co., 589 A.2d 17 (D.C. 1991)* the Court stated that a plaintiff may successfully claim tortuous interference with a contract by a party to the contract when there are multiple parties to the contract, as in the instant case.

CONCLUSION

For the aforementioned reasons, Plaintiff has satisfied that it is entitled to a reversal of the Summary Judgment ruling by the trial judge as a matter of law with respect to

Plaintiff's claims. Where the matter under review requires invocation or declaration of a fact-free general principle of law the appellate court will designate the issue as a question of law, and review the matter "de novo". "De novo" review empowers the appellate court based on an original appraisal of the record, to reach a different result from the trial court without deference to that court's findings. *Davis v. United States 564 A.2d 31-36 (D.C. 1989) (en banc).*

Some issues in the instant case present "mixed questions of law and fact"calling for the consideration of analytical and functional factors in selecting a proper standard of review.

Respectfully submitted,

B. Walker

Beth Walker, Bar 956730
Counsel for Appellant – David Whitehead

Certificate of Service.

I hereby certify that on September 26, 2001 I caused the foregoing Supplemental Brief for Appellant to be served by first-class mail postage prepaid upon the following:

Daniel I. Prywes, Esq.
O'Kelly E. McWilliams, Esq
600 14th St. N.W. Suite 500
Washington, D.C. 20005

Philip A. Latimore III, Esq.
2400 6th St. N.W. Suite 321
Washington, D.C. 20059

B. Walker 9/26/01

Beth Ann Walker Date:

Riady Will Admit Illegal Donations

Plea Deal Provides Fine, No Jail Term

1-12-01, A1

By Susan Schmidt
Washington Post Staff Writer

Indonesian banking magnate James Riady has agreed to plead guilty to conspiring to illegally funnel foreign funds to the campaigns of President Clinton and other U.S. politicians, federal prosecutors said yesterday. Riady has agreed to pay a record $8.6 million fine for the election law violations, but will receive no jail time under a deal with prosecutors.

Riady is a principal in the family-owned Lippo Group, a financial services conglomerate whose campaign largess has been scrutinized for three years by Congress and the Justice Department's campaign finance task force. Documents filed by prosecutors yesterday in Los Angeles lay out in detail how Riady and John Huang, a former Lippo employee in the United States, moved hundreds of thousands of dollars from Lippo-owned firms abroad into political campaigns here. Riady is to appear in court in Los Angeles on Tuesday for sentencing; Huang pleaded guilty to similar charges in 1999.

Riady has admitted he and Huang provided money to political campaigns to influence American politicians on matters of interest to Lippo, including gaining normal trade status for China, open-trade

See RIADY, *A4, Col. 1*

Riady Fined $8.6 Million For Campaign Violations

Guilty Plea Leads to a Record Penalty

Associated Press

LOS ANGELES, March 19—Indonesian businessman James Riady pleaded guilty to campaign finance violations today and agreed to pay the U.S. government a record $8.6 million in fines for using foreign corporate funds to back Bill Clinton's 1992 presidential campaign.

U.S. District Judge Consuelo Marshall accepted the plea from Riady, a key figure in the Democratic campaign finance scandal. Assistant U.S. Attorney Daniel O'Brien said the fine was appropriate to the case.

"The fines to be paid by Mr. Riady are the largest in the history of the United States," O'Brien said.

He said Riady is worth about $20 million, and that the fines represent about 45 percent of his net worth.

Riady, a member of the family that runs the Indonesia-based global conglomerate Lippo Group, had been described as a billionaire.

Marshall said that since case negotiations began, Riady's firm, LippoBank, merged into another bank and ceased to exist. The judge raised questions about how the fines would be paid and whether they would come from Riady's own money or other entities.

O'Brien said the fines would be paid in four installments—starting with more than $2 million that was to be paid tonight. He said he could not police where the money will come from. Riady's lawyers said he has indicated the fines will be paid from his own money.

Foreign campaign contributions are illegal under U.S. law. The contributions were funneled through Hong Kong bank accounts and Lippo entities overseas, the government has said.

The judge asked Riady if he understood that what he had done was illegal.

"I was not familiar with these rules and regulations," Riady said. "But I had a general sense that if you contributed, it should be your own money."

He also said he knew his colleague, John Huang, was reimbursing other people to make contributions to the Democrats.

The judge then asked if Riady realized he was providing the money in the form of bonuses to Huang to violate campaign finance laws.

"Yes, your honor—not necessarily personally, but the companies I worked for," he said.

Huang earlier pleaded guilty to campaign finance violations and has been cooperating with the government since August 1999.

Cottage Books
Reply: P.O. BOX 2071, SILVER SPRING, MD 20902 301-649-5123

December 13, 1999

Mr. David Whitehead
1101 Westfield Drive
Oxon Hill, MD 20745

Dear Mr. Whitehead:

As requested, I have perused selected lines and segments from your novel, "Brains, Sex & Racism in the CIA," and compared them with selected lines from the book and movie, "Mission Impossible." I have observed an astonishing number of similar situations, character names and lines of dialogue that occur in them.

To the extent that it might be useful, I am willing to discuss my observations with your legal counsel.

Sincerely,

Samuel F. Yette
Publisher

COLUMBIA UNION COLLEGE
Gateway to Service

November 26, 1999

David L. Whitehead
1101 Westfield Dr.
Oxon Hill, MD 20745

Dear David,

I have carefully examined the document Exhibit A in the case *David L. Whitehead v. Paramount Pictures Corporation Inc., et al.*, (Case No. 96CV1677) and find substantial similarities between the novel and film *Mission Impossible* and your book, *Brains, Sex, and Racism in the CIA and the Escape*, particularly sections I and II of the document. I find partial similarities in sections III, IV, and V, and sufficient evidence of striking similarities in section VI, Misc. II to warrant further investigation.

Based on this evidence, I would support your claim in this case.

Sincerely,

Barry L. Casey

Barry L. Casey, Ph.D.
Chair, Communication Dept.
Columbia Union College

7600 Flower Avenue, Takoma Park, Maryland, 20912-7796, 301/891-4000, FAX 301/270-1618, http://www.cuc.edu/

Barry L. Casey, Ph.D.
7902 Long Branch Pkwy.
Takoma Park, MD 20912

May 23, 2001

To Whom It May Concern:

I find substantial similarity between the film *Mission Impossible* and Mr. David Whitehead's autobiographical book, *Brains, Sex and Racism in the CIA and The Escape.*. There is similarity between the main characters and their actions, similarity in plot, development of the storyline, and dramatization. There also appears to be similarity in phrasing, word choices within parallel scenes, and the development of the action from scene to scene.

Sincerely,

Barry L. Casey

Barry L. Casey, Ph.D.

DAVID L. WHITEHEAD
1101 Westfield Drive
Oxon Hill, MD 20745
301-567-8262

March 10, 1998

Mr. Benjamin Zinkin
New Line Cinema Corporation
888 Seventh Avenue
New York, NY 10106

RE: Wag The Dog and College Thesis Paper on Korean and Gulf Wars

Dear Mr. Zinkin:

This letter follows my mailing of February 21, 1998 of my Masters Thesis submitted in 1991 and successfully defended in 1993 for a Masters Degree from Howard University.

One of the main themes in my thesis entitled "International Law Regarding The Use Of Force And Collective Security: A Comparative Analysis Of The Korean and Persian Gulf Wars" was that President George Bush created the Gulf War as a political diversion to take attention away from political and personal problems, including the savings and loan crisis in which his son Neil Bush was implicated; his veto of the 1990 civil rights bill; and the Iran-Contra scandal.

The film, Wag The Dog's main theme is about a U.S. President who created a war in the Persian Gulf in order to divert attention away from his personal problem (sex). My thesis pre-dates both the novel on which the film is purportedly based and the film itself. It is my understanding that Dick Parson of Time Warner is a Trustee on the Howard University Board of Trustees, and that his company has had contractual arrangements in the telecommunications area with the University.

In 1992 I circulated my thesis to New York and Boston publishing houses, and entered into a publishing contract with Vantage Press on November 10, 1992. The manuscript was held until such time as I could come up with $7,000. It has not been returned, which is also the case with the other publishing houses.

It is my belief that there has been a copyright infringement of the expression of my ideas in my thesis by New Line Cinema's producers and writers of Wag The Dog. Therefore, I have submitted

to Judge Deborah K. Chasanow of the U.S. District Court for the District of Maryland a request for permission to sue Time Warner, Inc. and New Line Cinema Corporation for copyright infringement.

To avoid this litigation, I am demanding Two Hundred and Seventy-Five Thouand Dollars ($275,000) as compensation for the use of my intellectual property as stated above.

I look forward to your prompt and immediate reply to this communication.

Sincerely,

David L. Whitehead

David L. Whitehead

cc: Ginny Martino

TESTIMONY OF ATTORNEY BETH ANN WALKER

House Judiciary Subcommittee on Courts, Internet and Intellectual Property
Hearings on the Statutes that Govern Judicial Disqualification and Recusal
October 25, 20001

Mr. Chairman, and distinguished Members of the Subcommittee:
It is indeed an honor and privilege to be able to appear before you today on a matter of utmost importance to me, and my client, Mr. David Whitehead. As a former staffer on the Hill, I would like to compliment the Chairman on his professional staff members, Mr. Keith Ausbrook, Chris Katopis, and Melissa McDonald, for their open door policy for all Americans and their diligence in trying to understand a very complex case. This has never been a sound bite story. It is a murky, circuitous example of the perversion of our current campaign finance system, which has invaded our judiciary branch of government.

About a month ago, I heard the familiar voice of the famous actor, director, and social activist, Robert Redford on T.V. He was asked by the interviewer about his role in the famous movie, "All the President's Men", where he portrayed the famous investigative reporter, Bob Woodward. He expressed what I had been thinking about for a long time. According to Mr. Redford, Watergate probably would not occur in this day and age because of the lack of independent newspapers. And, I would add that corporate control of Hollywood studios; the same corporate ownership of television networks and newspapers around the country would prevent a Watergate from being exposed to the public in 2001. In fact, it was President Clinton who first coined the term "Hollyticking" for his fundraising efforts in Hollywood, which proved to be so lucrative.

Several well-known reporters have informed me that they view my testimony today as three notches below the Watergate scandal. However, they have not been able to print the story unless there was an official governmental inquiry to justify it. They informed me that the people involved in this story are just "too powerful, too high up, and too well

connected on both sides of the aisle" to warrant the risk of reprisals from their editorial boards and supervisors.

Let us move forward on this matter and prove Robert Redford wrong. Let us try and preserve the Rule of Law and an independent judiciary. Let's assure the American people that the integrity of our courts will be preserved no matter whose toes are stepped on. Let the investigation and overhaul of our current system of disqualification of our judges begin today with a new enthusiasm for justice at any cost.

BACKROUND ON THE MISCONDUCT CASE

About one year ago, I was approached by the Georgetown Law Clinic to assist Mr. Whitehead with his cases. He had represented himself in some complex copyright cases and was frustrated with the decisions of Judge Paul Friedman. I informed Mr. Whitehead that I could not represent him, but I would try assisting him in finding the right Counsel for his cases, and in the meantime to just "follow the money trail because it will lead you to where you want to go." The big firms had to conflict out since he had sued many Hollywood studios and the attorneys with a specialty in copyright were astronomical in their fees for Mr. Whitehead. In March of 2001, I bumped into Mr. Whitehead in the Court of Appeals and he literally begged me to review the financials of Judge Friedman to see if there were any conflicts, and informed me that he indeed followed my advice and the money trail. I did not expect to find any problems and thought it would put my client to rest. I admired his fortitude in trying to proceed without Counsel.

It is not easy to review the financials of judges. You have to make an appointment at the John Marshall Building, and sign a form that the U.S. Marshall Service may have to investigate you because you viewed these precious documents. This alone would be intimidating to most attorneys. Also, most attorneys would not sign on to this endeavor for fear of reprisals by judges on their other pending cases.

RECOMMENDATION FOR REFORM:

Attorneys need to be protected from such fears. This process should be confidential. Also, it is interesting to note that all the financials are coded and it would take an average person a substantial investment of time to learn and decipher the alphabetical codes for values, and type of assets. A Civilian Board of Review on Ethics should be designed for inquiries as this initial level.

PROFESSSIONAL BACKROUND OF ATTORNEY WALKER

Since I have practiced law for over twenty years, I am quite familiar with the confirmation process and asset disclosure requirements. My background on the Hill qualified me to decipher the judge's financials very quickly. I served as Legislative Assistant to the Hon. John Paul Hammerschmidt (R. Ark.) for almost ten years. Mr. Hammerschmidt is famous as the only man to run a race against President Clinton and win. I was with Cong. Hammershmidt when he won the race against Jim McDougal, President Clinton's buddy who went to jail on Whitewater. I will never forget following that race Mr. Hammerschmidt stating, " now I know what it is like to take a six million dollar bath in mud". My understanding of Clinton's Arkansas political ties goes back to the 1970s.

Following that stint, I moved to the great state of Oklahoma, and practiced law with R. Marc Nuttle who taught me everything you wanted to know about Campaign Finance but were afraid to ask. Attorney Nuttle, former Deputy Dir. of the Republican Congressional Campaign Committee, and Counsel to the Senatorial Election Committee is in my view the premier attorney in the field of election law today.

My experience in the executive branch of government was under President Ronald Reagan, where I served as Congressional Liaison Officer for the FAA and Legislative Research Officer in the office of Secretary Elizabeth Dole. Lastly, my skills transferred into the Courtroom and I became a trial lawyer upon the birth of my daughter at the age of 39, a much-needed sabbatical from politics and eighteen-hour days. I have represented hundreds of indigent defendants, juveniles and neglected children in the court system

Therefore, my unique legal background in Legislative Law, Federal Election Law, and Criminal Law made me ideally suited to unravel this intricate web of deception, high level players and their varied interests served through judicial action and inaction. This cumulative legal experience was needed to research and uncover the alleged scandal that I am asking the Subcommittee to investigate today, and to support our pending FEC Complaint NO. 5237, which has been re-filled after our meetings with the FEC Counsels. It has been perfected to meet the required *contribution test.* The commissioners will vote on this FEC matter shortly, and can refer this matter to the Department of Justice. Subpoena power is needed to get to the bottom of it. Randall D. Elliason, the chief of Public Corruption and Government Fraud at the Justice Department has also been of assistance and is aware of our evidence.

THE CASE FOR MISCONDUCT

The crux of Mr. Whitehead's cases involved major Hollywood studios. What struck me the most upon reviewing the financials were the Judge's continuing ties to his law firm, White and Case. Simply put to the Subcommittee, a careful review of Judge Friedman's activities reveals that it is possible to state that the judge's ties to his law firm of White and Case were never truly severed. The defendants named by Plaintiff, Whitehead, were very familiar to his law firm. The firm represented the defendants on numerous matters. Judge Friedman was its executive partner, and was at the firm from 1979 to 1994.

During his confirmation hearings he stated to the Congress that he would not take cases that were related to clients of the law firm. Did the judge lie to Congress? Although the subject matter of Mr. Whitehead's cases may be different, it is complicated by the fact that the judge still had a financial interest in his law firm, which made his disqualification **mandatory** under the governing statute. Judge Friedman ruled on the Whitehead's cases for breach of contract against the CIA, which named Del. Homes Norton as a material witness despite the fact that he was co-chair of her campaign and was introduced by her to the Congress. Judge Friedman's financial ties to the firm of White and Case are not attenuated and should not be minimized by an investigative body. He did not have the

right to proceed to rule summarily on Mr. Whitehead's arguments, denying discovery and other avenues for him to prove his cases. Summary judgments are not encouraged in copyright cases at all. The judge not only had his pension and capital contribution accounts but astonishingly he reports on his financials that he is a General partner, with other White and Case partners and former partners in Walpark Investors, an investment general partnership which in turn is a limited partner in three separate limited investment partnerships in which he invested through Walpark. Our research shows that Walpark Investors have media related and client related investments. (Sony)

It appears to meet the "reasonable man test" required under the statute that the Judge still has a financial interest in his law firm and its clients. He should not have considered cases where the defendants are directly related to his law firm's client base. The Committee should note that even one share of stock is enough to disqualify a judge from a case. The Judicial Conference or the Congress should carefully scrutinize the judge's stock portfolio during any further investigations.

The Subcommittee should note that under the present rules if you still have financial ties to your law firm, you couldn't hear cases involving those clients. As an attorney I was familiar with White and Case's client base. An average citizen, or a pro se litigant, like Mr. Whitehead would have no way of making that connection. Ethically, I was obligated as an officer of the court to bring this matter to the court's attention. I helped Mr. Whitehead file his Original Misconduct Complaint under the Statutes being reviewed today. We received our docketing number in the mail in the same week we received out rejection letter by the Chief Judge. Interesting to note that within two months of the filing of my Original Misconduct Complaint, both Norma Holloway Johnson, and Chief Harry Edwards resigned from the Court.

The Original Misconduct Complaint against Judge Friedman must be viewed as ancillary to the Complaint Against Chief Judge Norma Holloway for abandoning the random selection process and funneling cases to Clinton appointed judges. It was reported that

the Republican judges were the ones that leaked to the press that these "magnificent seven" judges appointed by President Clinton were meeting in private.

The investigation of Chief Norma Holloway and the abandonment of random selection were deficient on several fronts. The Second half, of that investigation which I am seeking from the Judicial Conference will not happen unless there is a Congressional recommendation for it to go forward from the Judiciary Committee, and other leaders in the House and Senate.

HOW THE FIRST INVESTIGATION WAS DEFICIENT:

The First steps I took upon dissecting the financials of Judge Friedman was to read Senator Thompson and Cong. Burrton's hearing reports on abuses of the Campaign Finance system. The Senate report quotes an FBI task Force, which was assigned to the investigation. I called the four FBI agents. The first agent I called was Agent Roberta Parker. I asked Ms. Parker, how in the world could that investigation be concluded without knowing what I saw on Judge Friedman's financials. She informed me that there was no investigation of Judge Friedman as part of their investigation. It stopped with Chief Judge Norma Holloway Johnson. How does that make any sense to investigate the judge assigning the cases and not whom the cases were assigned? I was basically dumbfounded that if they knew what I knew, why was my investigation necessary.

I informed her that I was representing an ex – CIA employee whose many lawsuits had all ended up with Judge Friedman, and of my suspicions that Judge Friedman's handling of the Hollywood cases was linked to campaign contributions to the DNC and Presidential races. She informed me that she in fact wrote a memo to higher ups within the Justice Department that they did uncover evidence of CIA involvement in campaign fundraising, which was basically ignored. She stated that she wanted to meet with me in private. I told her that I was worried about this new information and what to do with it. She suggested that we meet in Annapolis the next day, May 10, 2001 for lunch at about 1 PM since she would be in town that day. My client was concerned and advised me to have a friend at the meeting for verification. The meeting never occurred because that

morning I received callbacks from the other FBI Task Force Members, including Mr. Sheridan stating "Ms. Walker, what you are saying would not surprise us, but we cannot comment on it at this time." Around Noon, I received a very polite call from Mr. Parker canceling the meeting at my home in Md. She was based in Baltimore at the time, and I have never heard from her again. Senator Thompson's Committee Report indicates a Chapter on concerns about CIA involvement in political affairs. Chapter 30 of his final Report-105-167 covers CIA involvement with Roger Tamraz and other domestic activities. We know the CIA cleared foreign spies, gave them top-secret clearances and allowed them into the White House and used these men for fundraising purposes in various modes. See Senate Report of Senator Thompson, House Reports of Cong. Burton. As matter of fact Cong. Burton was in a showdown with Attorney General Ashcroft when he demanded to see such memoranda on campaign finance sent to the Justice Department. A hearing was scheduled for Thursday, September 13, 2001 but unfortunately because of the bombings, that hearing had to be delayed until later in the year.

I requested that these Four FBI Task Force Members be in attendance at my requested meeting with Mr. Ellison – the Dir. of Public Integrity Div. at the Justice Department. Mr. Ellison has always returned my calls and accepted all my documents and requests for a formal investigation. Counsel does not know the status of any grand jury investigation at this time. I asked Mr. Ellison for some protection for my client who I feel today is a material witness in a major judicial corruption investigation. I divulged this information to the Committee's counsels in my second meeting, and it appears on the flow chart I submitted to the panel as well. Mr. Whitehead's case may be just the tip of the iceberg of this scandal, but he is also the only American who has legal standing to bring these charges in the Courts, as the injured party. The Indonesians are surely not going to object to their probation sentences. **(See Flow Chart on the Compromise of Judicial Integrity on both the Civil and Criminal sides of Court)**

THE REJECTION OF MY FIRST MISCONDUCT COMPLAINT WITHIN ONE WEEK.

In all my years in the Courts, I have never seen a document processed and rejected faster that my original misconduct complaint. It flew off the table. There is no way that the investigations into the financials, and clients of White and Case could have ever been dissected in that short time frame. The initial request to the Chief Judge for an investigation was summarily rejected under the claim of "not cognizable".

THE " NOT COGNIZABLE OUT CLAUSE"– WIGGLE ROOM FOR CRONYISM

Congress now knows by the dismal dismissal rate that many judicial misconduct cases, argued all the way to the Supreme Court have gone by the wayside. Under the present law, a complaint may be dismissed if it is "*directly related to the merits of a decision or procedural ruling*". Most of the cases are dismissed on this umbrella clause, which shields the judges. Did Congress really intend to give the Appellate courts in the various circuits that much power to police its own Court. As an example it should be noted that Judge Friedman served on a Judicial Nominating Committee in D.C. that nominated several of the judges he served with in the D.C Court. He was a busy writing articles seeking the President to name D.C. judges to the Supreme Court. Were these the same judges that would rule against him on the Judicial Council?

Recommendation for Reform:

The second review layer should be made up of civilians and judges. It makes little sense to be able to shield this process in secrecy with friends as fellow judges appointed by the same President during a time of costly federal campaigns. The biggest unreported scandal during the Clinton era according to experts who cover the Justice Department was the massive infusion of money from foreign nationals and foreign corporations into our political campaign system during their last cycle.

Therefore, because of this "*directly related to the merits of a decision or procedural ruling clause*", Counsel was forced to go out of the box on Mr. Whitehead's case to try and perfect a misconduct claim against Judge Friedman. To me, out of the box meant his Indonesian ties, which were many. He sentenced the Indonesians to probation in cases that were funneled to him from Judge Norma Holloway Johnson. He issued a questionable ruling on the legality of foreign soft money that was eventually overturned by the Court of Appeals buying the DNC some time before having to return foreign money, a dilatory tactic. See opinion of the Honorable Patricia Wald, in Case NO. 99-3019 and 99-3034 on the case of Paula Kanchanalak, a DNC fundraiser and lobbyist from Thailand, which gave Judge Friedman a stinging reversal and lecture on the correct definition of illegal hard and soft money under the FEC regulations. According to Senator Thompson, the Clinton White House "in order to raise the money they often eviscerated or ignored federal campaign finance laws and reduced the White House, the Administration, and the Presidency itself to a fundraising tool. Ultimately, the sale of access may have led to the sale of policy as well". Do we now believe, knowing what has already been revealed that Clinton's national obsession with fundraising ended at the Court's doors? We should definitely find out. This is why the Whitehead case is an important one.

Judge Friedman's law firm had offices not only Hollywood, but in Jakarta, Indonesia and his firm represented Lippo, and various subsidiaries, and the Suharto Government. We all know the astonishing revelations about the abuses at the Department of Commerce during the Huang era. Was our top foreign intelligence agency, the CIA out looking for terrorists, or were they in fact being used by President Clinton to further his fundraising efforts on the domestic scene with foreign nationals and foreign corporations. Did such action put our domestic security in jeopardy? Why did NSA have to stop the CIA from clearing these characters into the White House? Was our over six billion dollars in funding for intelligence gathering well spent? Is it a coincidence that all the old cronies from the Arkansas days – like Gov. Jim Guy Tucker, and Web Hubbell and the Stephens crowd worked with Lippo. We need to examine the White and Case Law firm ties with Lippo, and Stephens Inc. It is interesting to note that Web Hubbell was also

paid by MGM during the time he refused to testify. The Hollywood and Indonesian ties are evident and correspond to Judge Friedman's rulings on Hollywood and Indonesian fundraising issues. His law firm colleagues received Presidential appointments to Asian panels.

Despite the fact that our misconduct complaint met the stringent test of issues " *which did not go directly to the merits of a decision or procedural ruling clause* " in the Whitehead cases, the misconduct case was still thrown out with impunity.

Recommendation for Reform:

Strike this language allowing the dismissal of a case if it is " *directly related to the merits of a decision or procedural ruling*". This provision makes no sense whatsoever and impedes the proper investigation of relevant issues that can prove judicial bias or corruption.

APPEAL FROM THE INITIAL MISCONDUCT RULING BY JUDGE EDWARDS TO THE JUDICIAL COUNSEL – STEP 2 OF A LONG JOURNEY – CONFLICTS GALORE

I made inquiry to Judge Hogan, the new Chief Judge, to ascertain the makeup of the new Judicial Council. His Clerk informed me that the panel would be reconstituted, and I received the new list of names. Before I had an opportunity to check this new reconstituted panel for conflicts, they ruled against me in a cryptic not cognizable, not reviewable response.

When Judge Kotelly started getting bad publicity for hearing the Microsoft Case with her husband's potential conflicts at the Dickstein Law Firm, my client realized that they were our opposing counsel in his only pending case in D.C. Federal Court, Docket NO. 01-1192. Are we to believe that it was an oversight that Judge Kotelly did not know the major clients of her hasband's firm included Viacom and CBS? This is not a client that they are likely to forget. A recusal was in order for her, but Judge Friedman needed her vote.

Also, Judge Judith Rogers also sat on the Judicial Council. Judge Rogers and Judge Paul Friedman both clerked for Aubrey Robinson, and his financials revealed they exchanged a gift of $250.00. A sign of friendship to be sure. Judge Rogers, should have recused herself as well. They didn't because Judge Friedman needed these votes to stem the swelling tide towards an investigation. This investigation would have allowed Counsel the opportunity to cross examine and call witnesses. It had to be stopped. Judge Friedman needed her vote too.

PHASE THREE – THE TRIP TO THE JUDICIAL CONFERENCE – AT LAST OUT OF D.C. CONTROL – BUT...NOT REALLY...THE CATCH

The Judicial Conference will not consider the complaint unless an investigation is ordered by the Judicial Council – Step II. In conclusion it appears that the Federal Judiciary is dismissing solid complaints based on hard evidence, and they misrepresent the crux of the complaint and do little follow up in the investigative arena to substantiate these claims against their friends. The standard for review is all done in secret with a very small paper trail. The federal judiciary has failed to fully respond to its mandate to fully appreciate the disciplinary process. It needs to be reformed forthwith. The only way the Judicial Conference will act is if Chairman Coble and other Members ask them to go forward.

It is based on these experiences that I can now state equivocally that 28 U.S.C. Section 144 and 455 – the statute governing judicial disqualification and 28 USC Section 372 (c), the statute governing judicial discipline is not adequate or effective. The federal judiciary has successfully blocked the true congressional intent of these provisions, by making these complaints unavailable to the public and by its failure to report to Congress the results of its findings and percentile of dismissal. The Circuits have failed to provide reasoned rationale in its case law for their rejection of complaints. The area is fraught with uncertainty.

Recommendation for Reform:

Lawyers with expertise in the area of judicial ethics need to be hired to review compliance with the express intent of the Congress for oversight on Section 372 (c). The court has shown through its handling of the Whitehead Case, and its rejection rate of other claims of corruption and misconduct that it cannot and will not police itself.

According to the Administrative officer's Annual reports, in the past, the federal judiciary disposed of hundreds of complaints in a year without one investigation going forward to Congress, or a single judge having been disciplined, either publicly through impeachment, or privately censured. The Congress must deal with this dismal dismissal rate through reforming these statutes.

I would like to thank two Professors who have taken time out of their busy academic schedules to address the important issue of judicial ethics. Their works have been clarifying documents and I would commend their latest law review articles to the attention of the Committee. This gentleman should be included in any panel discussion of where to go from here with these statutes. I fully support the additional recommendations for reform as outlined in their articles. Professor Les W. Abramson's most recent article entitled "Appearance of Impropriety: Deciding When a Judge's Impartiality Might Reasonably be Questioned" appeared in the 2001 issue of the *Georgetown Journal of Legal Ethics*. Mr. Abramson has written most of the books on this subject which appeared in the D.C. Court's judge's library and he still teaches law at Brandeis School of Law in Ky. He is married to a well respected judge as well.

The Second Professor is David Barnhizer who was encouraged by your old colleague Bob Drinan to write his latest work entitled, " On the Make: Campaign Funding and the Corrupting of the American Judiciary". It was published in the Fiftieth Anniversary issue of *Catholic University's Law Review*. Mr. Barnhizer is also a Professor of law and teaches at Cleveland State University.

Also, on a personal note, this was a difficult case for me personally since I have worked with wonderful judges over the last decade in D.C. Naturally, I like the ones that gave

me acquittals the most. However, most of the judges I have appeared before are honest, hard working individuals who have sacrificed much to serve their county.

Last Thansksgiving, I called to check on a troubled teen who was in a D.C. detox facility that was very depressing. When I called to speak with my juvenile, Judge Nan Shuker has already been there to take her and another teen to Thanksgiving dinner with the judge's friends. Judge Mitchell Rankin never failed to ask what she can do for a neglected child at Christmas out of her own pocket. The dedication of Judge Rufus King at the D.C. Superior Court has inspired all the judges and attorneys that he can make a model court for our city. I think instances of judicial misconduct are rare.

David Whitehead is a gifted author, researcher, and professor of comparative politics. He has a master's degree from Howard University, where he attended college on a basketball scholarship. He grew up in a military family and has aspired only to do well. He has written several works that have drawn fire. He was man enough to throw his hat in the ring against Jesse Jackson for Shadow Senator in D.C. He was man enough to file one of the first Title VII Discrimination cases against the CIA and write a book about it. He was man enough to stand up to Judge Friedman when he sensed something was amiss. He deserves his day in Court with a neutral and impartial judge. He deserves your attention.

Lastly, let me add that the book "***The Final Days***" by Barbara Olson, the wife of our respected Solicitor General, has proved to be an inspiring treatise and most helpful in our continuing efforts to uncover the truth, and final chapter.

Respectfully submitted,

Beth Walker

Beth Ann Walker, Bar 956730
Counsel for David Whitehead, complainant

Enclosures to be submitted for the record will include the following:

- A copy of our original misconduct complaint
- A copy of our appeal to the Judicial Council
- A copy of our first FEC complaint and our second perfected filing MUR 5237
- A copy of our Flow chart – which shows how the integrity of our D.C. Court was compromised on the civil and criminal sides by Judge Friedman's rulings.
- The Law Review articles quoted on page 12 by Prof. Abramson and Prof. Barnhizer
-

Note, these documents have been tendered to the Committee, the FEC and DOJ.